IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1847

MARK W. GERACI
and
JOSEPH A. GERACI,

Petitioners,

vs.

ST. XAVIER HIGH SCHOOL,
REV. PAUL BORGMANN,
MICHAEL D. TRAINOR,
THOMAS A. MEYER,
REV. ROBERT O'CONNER,
RICHARD B. BERNING,
RICHARD J. PIENING,
JAMES F. CAHILL,
REV. DANIEL L. FLAHERTY,
and
SOCIETY OF JESUS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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JURISDICTIONAL STATEMENT

Petitioners respectfully petition this Court for a Writ of Certiorari to review the final orders and judgments of the Supreme Court of Ohio entered on March 23, 1979 dismissing their appeal without opinion and denying their Motion for an order directing the Court of Appeals for the First District of Ohio to certify its record to the Supreme Court of Ohio, which are appended hereto on pages 1a and 2a of the Appendix.

The opinion of the Court of Appeals of the First District of Ohio was returned on December 27, 1978, is not reported and is appended hereto in the Appendix, P. 6a.

The application of the Petitioner to reconsider was denied by the Court of Appeals on January 25, 1979, without opinion.

The jurisdiction of this Court to consider the Federal Constitutional issues is conferred by *Title 28, Section 1257(3) U.S.C.* which is appended hereto on P. 37a of the Appendix.

QUESTION PRESENTED FOR REVIEW

Does the Fourteenth Amendment to the United States Constitution confer on a student in a private or parochial school the right to "due process" in disciplinary proceedings against him?

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, Section 1 to the United States Constitution is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The manner in which the rights guaranteed to the Petitioners under the Fourteenth Amendment to the United States Constitution were raised in this case is as follows:

1. Complaint of the Petitioners in the Court of Common Pleas of Hamilton County Ohio, Page 6, Item 15, in which it is alleged that the Respondents "failed to accord the Plaintiffs 'due process' and 'equal protection' with other students at said school as required by State and Federal laws."

   Said Item 15 is Appended hereto on P. 28a of the Appendix.

2. Memorandum of Petitioners filed at the trial in the Court of Common Pleas, Hamilton County Ohio — Page 10, in which it is claimed that there had been a violation of Petitioners' rights of "due process" and "equal protection".

   Excerpts from this Memorandum is appended hereto on P. 29a of the Appendix.

3. Opinion of the Court of Common Pleas of Hamilton County Ohio which is appended hereto on P. 17a of the Appendix.

   Special attention is called to pages 1 and 6 of the Opinion in which the Court finds: "that due process is not applicable to a private institution based on the evidence of this case."

4. Page 8 of the Memorandum of the Petitioners in the Court of Appeals for the First Appellate District of Ohio which is appended hereto on P. 30a of the Appendix, in which the following appears:

   > "The Trial Court erred to the prejudice of the Plaintiffs when it held that the Constitutional rights of due process guaranteed by the Fourteenth Amendment of the United States do not extend to them.

Issues Presented for Review

First Issue

The Constitutional right of due process set forth in the Fourteenth Amendment of the United States applies to and is controlling in disciplinary proceedings by a private school against a student."

5. Memorandum of the Petitioners in the Court of Appeals for the First Appellate District of Ohio in which the following appears on P. 18 thereof:

"Second Issue

The Constitutional right of due process set forth in the Fourteenth Amendment of the United States requires that disciplinary proceedings against a student by a private school for which expulsion is a possible penalty be procedurally fair with notice and substantially all of the rights granted in a judicial hearing."

6. Opinion of the Court of Appeals for the First Appellate District of Ohio which is appended hereto on P. 5a of the Appendix.

Special reference is made to P. 2 where the Court recognizes that the issue is "whether appellants' constitutional right to 'due process' has application to the conduct or disciplinary proceedings by a private school."

7. Assignment of Error No. 1 of Petitioners in the Court of Appeals as follows:

"The Trial Court erred to the prejudice of the Plaintiffs when it held that the Constitutional rights of Due Process guaranteed by the Four-

teenth Amendment of the United States do not extend to them."

8. Notice of Appeal of the Petitioners to the Supreme Court of Ohio from the Court of Appeals appended hereto on P. 3a of the Appendix with special reference to the following statement therein:

"This case involves a substantial Constitutional Question, concerning namely the Fourteenth Amendment of the United States Constitution and is of public or great general interest."

STATUTES INVOLVED

Section 2721.09 O.R.C.
Section 3321.04 O.R.C.
Section 3321.07 O.R.C.
Section 3321.38 O.R.C.
Section 3321.99 O.R.C.

STATEMENT OF THE CASE

Petitioners Mark W. Geraci, a student at St. Xavier High School, Cincinnati, Ohio, and his father, Joseph A. Geraci, filed a Complaint in the Court of Common Pleas of Hamilton County Ohio to restrain the Respondents, St. Xavier High School and its various administrators from expelling him on account of alleged misconduct which took place on June 2, 1978. An additional Count asking for a Declaratory Judgment of the rights and status of the parties, as well as further relief based on such determination was included in the Complaint.

The Trial Court denied Petitioners' request for relief and found that St. Xavier High School, Respondent, was

a private institution not covered by the Fourteenth Amendment of the United States Constitution and thus, not required to afford the Petitioner "due process".

It also found that a contract existed between the parties for the education of Mark W. Geraci, the terms and conditions of which were set forth in the Student Handbook issued by the school. The Court further found there were eleven offenses for which the maximum penalty was expulsion as set forth on P. 18 of the Student Handbook, which is appended hereto on P. 38a of the Appendix, and Mark was guilty of violating Offenses No. 1 and 8. These offenses were:

(1) No. 1: "Conduct detrimental to the reputation of the School."

(2) No. 8: "Immorality in talk or action."

The Trial Court found that Mark W. Geraci had breached the contract for his education by his misconduct, and the expulsion was warranted. The Court of Appeals affirmed the judgment of the Trial Court, and the Supreme Court of Ohio dismissed the Petitioners' Appeal finding no debatable constitutional questions and denied their Motion to Certify.

STATEMENT OF FACTS

On June 2, 1978, a lemon meringue pie was thrown at James Downie, an English teacher at St. Xavier High School, a Catholic Parochial High School at Cincinnati, Ohio by Tom McKenna, a student at Moeller High School, Cincinnati, Ohio. This was intended to be a prank on the last day of school concocted by seven of Mr. Downie's students. There was little or no injury to Mr. Downie since the pie only struck him on one side of the face, and most of it was dissipated on his clothes and the blackboard.

Petitioner Mark W. Geraci was expelled the same day by Thomas A. Meyer, Assistant Principal in charge of discipline at St. Xavier High School. Mr. Meyer summoned Mark by telephone in the early evening and summarily expelled him from school. No one else was present at the meeting. Mark was seventeen years of age at the time, a Junior at St. Xavier High School and the leading scholar at the school. He had received no prior notice of any charges against him and he did not bring his parents with him.

Earlier that afternoon, Mr. Meyer and Mr. Michael D. Trainor, the Principal of St. Xavier High School actively investigated the incident immediately after it had occurred and conferred with each other. They also received information as to alleged statements made by McKenna, the pie thrower, to Father Paul Borgmann, President of St. Xavier High School. Father Borgmann also was active in the investigation, caused McKenna's arrest and prosecuted him. These statements implicated Mark according to the testimony of Father Borgmann, and were not made in Mark's presence.

Mark's expulsion had been agreed upon prior thereto by Mr. Meyer and Mr. Trainor, and they both testified that their decision was irrevocable. Nothing that Mark

could say or do would mitigate the penalty. While Father Borgmann is the chief executive of St. Xavier High School, Mr. Meyer had complete authority to expel Mark Geraci.

It also is apparent that Father Borgmann, like the other administrators, had pre-judged Mark. After trying to avoid the elder Geraci for two days by representing that he was out of the city, he finally agreed to talk to him informally stating, "My mind is made up. There is no sense in trying to change my mind."

The attitude of the administrators of St. Xavier High School and their manner of dealing with Mark Geraci in expelling him without a hearing, "due process", or procedural fairness is well illustrated by the testimony of Thomas A. Meyer:

"Q. Would the record, the conduct record, be a factor that would be important to you as matters of — well, to consider as an extenuating circumstance in determining the severity of the punishment which you were going to mete to Mark Geraci?

A. Not in the case of an act this severe.

Q. In your opinion, this act was such that nothing could matter at all to you as far the penalty of expulsion?

A. Yes.

Q. There was nothing to mitigate; is that right, sir?

A. Right.

Q. Nothing he could say or do could mitigate it once you determined his guilt?

A. Correct."

The Disciplinary Board of St. Xavier High School made up of faculty members with advisory powers usualy summoned in serious disciplinary matters was not convoked. There can be no dispute that Mark had been pre-judged, and the Trial Court so found on P. 9 of its Opinion, "These latter two men had decided on the punishment of expulsion if Mark were found to be implicated."

This pre-judgment and summary dismissal without a hearing completely prevented Mark from clearing himself or mitigating the alleged offense. Subsequent to his dismissal and before trial in the Court of Common Pleas of Hamilton County Ohio, McKenna, the pie thrower, was killed in an accident. As a result, Mark was deprived of the one witness who could have exonerated him by testifying that he threw the pie as a prank of his own rather than for Mark. This would have established Mark's consistent claim of innocence based on the fact that the plan had been abandoned as far as he was concerned.

Mark W. Geraci and his father, Joseph A. Geraci, objected to the summary manner in which Mark was expelled, the lack of notice, charges, the failure to require the presence of his parents, an opportunity to present witnesses or statements in his defense or mitigation and other aspects of the expulsion which lacked procedural fairness. In this regard, Mark at all times contended that he was not guilty because the plan to throw the pie had been abandoned. They further contended that St. Xavier High School was engaged in activity of a public and governmental nature in the operation of its school. Accordingly, the Geracis filed suit claiming that the expulsion violated their Constitutional rights in that they were denied "due process" to which they were entitled under the Fourteenth Amendment of the United States Constitution and its equivalent of procedural fairness which Ohio Courts, by prior decisions, held applicable to disciplinary proceedings in private schools.

Evidence was produced to show that St. Xavier High School paid no real estate taxes to the State of Ohio, and its students received the loan of books, as well as transportation subsidies. Further, it was incorporated and chartered by the State of Ohio, it was certified by the Ohio Board of Education, and all of its teachers held certificates or licenses issued by the Ohio Board of Education. It met mandatory requirements of the Statutes and regulations of the Ohio Board of Education as to curriculum, hours of attendance, and otherwise complied with the standards which were incumbent on public schools. Moreover, it filed reports with the Ohio Board of Education and was periodically visited and inspected by representatives of the Ohio Board of Education and other accrediting boards.

Also, the public function of so-called private schools is attested to by the fact that the State of Ohio spends an average of $180 to $200 per annum in "Auxiliary Services" aid for each student for a total of $44,000,000 per year.

Joseph A. Geraci, the father had made a deposit on the tuition for the 1978-1979 school year for his son and the Trial Court found that a contract for the education of Mark existed between St. Xavier High School and the Petitioners for the ensuing year.

While Mark had made contact with Tom McKenna for the purpose of throwing the pie, he had done so on behalf of the six other students and he claimed that before the pie was thrown, the conspiracy was abandoned, and McKenna threw the pie on his own. Subsequent to the expulsion, the other students involved made know their implication in the conspiracy to Father Paul Borgmann, the President of St. Xavier High School, and asked that they be equally punished with Mark Geraci. However, Father Borgmann ignored them and no disciplinary proceedings were ever brought against them.

Mark subsequently enrolled at Moeller High School, another Catholic parochial high school in Cincinnati, Ohio, and he will graduate in June, 1979. However, St. Xavier High School was particularly meaningful to him because it is regarded as the leading Catholic high school in the country from an academic standpoint.

Mark's expulsion caused emotional and physical injuries to both him and his father which affected him psychologically as is apparent from his testimony:

> "Also, it damaged me as far as my ideas of justice and what it was all about. I didn't think I was treated fairly. I didn't think I had a chance to really have an impartial hearing with anybody present that could back up my story, you know.
>
> And, also, to realize that three years of hard study at this school, I didn't feel was taken into any consideration or appreciated by the people who were making the decisions, . . ."

The Constitutional question of the lack of "due process" was raised at every opportunity in this case commencing with the filing of the Complaint. This is evident from the various Opinions of the Courts which are appended hereto on pages 5a and 17a of the Appendix, in which each Court recognized Petitioners' claim of constitutional rights which were denied them as well as in the Notices of Appeal to the Ohio Court of Appeals and the Supreme Court.

ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

The decision as to whether or not private or parochial schools are subject to the "due process" clause of the Fourteenth Amendment of the United States Constitution is of great importance.

It has been determined by this Court in *Goss* v. *Lopez,* 419 U.S. 565; 95 Sup. Ct. Rep. 729 (1975) that disciplinary proceedings in public schools are of the gravest importance to all students and parents alike. This case pointed out that disciplinary proceedings become part of the record of the student and seriously affect his right to further educational and employment opportunities.

The suspension of a student for less than ten days without a hearing in accordance with Ohio Statutes was held unconstitutional.

A basis for the application of the Fourteenth Amendment to St. Xavier High School or any other private school is that its activity in educating children in a state where public education is mandatory constitutes the performance of a public or governmental function. While it is clear that St. Xavier High School is not a part of the State of Ohio, its educational activities are open to all races and religions, and are such that they constitute "state action" subject to the Fourteenth Amendment of the United States Constitution.

This Court has decided that activity of a public or governmental nature, even when performed by private persons on private property can be considered "state action" subject to the Constitution of the United States, particularly as to exercise of freedom of speech or of the press. While this Court has modified some of its original rulings in the cases cited, the existence of the doctrine contended for by the

Petitioners was recognized in *Amalgamated Food Employees Union Local 590* v. *Logen Valley Plaza, Inc.,* 391 U.S. 308 (1968) involving picketing in a labor dispute carried on in a shopping center; *Lloyd Corp., Ltd.* v. *Tanner,* 407 U.S. 551 (1972) involving the distribution of handbills protesting the Viet Nam War; *Marsh* v. *Alabama,* 326 U.S. 501 (1946) involving distribution of religious literature in a company owned town; and *Terry* v. *Adams,* 345 U.S. 461 (1953) involving the exclusion of blacks from a privately conducted Democratic primary. However, in *Hudgens* v. *N.L.R.B.,* 424 U.S. 507 (1975), the doctrine was to some extent modified in that activity incident to a labor dispute carried on in a shopping center was not protected by the United States Constitution. Nevertheless, the Court has recognized that the doctrine of "public or governmental function" does exist when the activity is very closely allied to that carried on by the State, as in *Marsh* v. *Alabama,* 326 U.S. 501 (1946) which has been continuously approved by this Court.

In *Lloyd Corp.* v. *Tanner,* 407 U.S. 551, 569, this Court stated the purport of *Marsh* v. *Alabama,* supra:

> "In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State."

To the same effect is the language in *Marsh* v. *Alabama,* 326 U.S. 501, 506:

> "Ownership does not always mean full dominion . . ."
>
> ". . . Since these facilities are built and operated primarily to benefit the public, and since their operation is essentially a public function, it is subject to State regulation."

In accord is *Evans* v. *Newton,* 382 U.S. 296, later referred

to in this Petition. Reference is made to P. 299 where this Court again recognizes the theory of State action:

> "That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature they become agencies or instrumentalities of the State and subject to its Constitutional limitations."

The Constitutional claim of "due process" has been asserted by the Petitioners with reference to the activities for which the Respondents were organized, namely its existence as an educational institution and the furnishing of education to young citizens of the State of Ohio. In this respect, this case differs from *Lloyd Corp. Ltd. vs. Tanner,* 407 U.S. 551 wherein this Court upheld the right of the owners of enclosed shopping centers to prohibit the distribution of handbills on their premises. This Court pointed out on P. 564 of *Lloyd*:

> "The handbilling by the Respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used."

The case at Bar differs from *Jackson* v. *Metropolitan Edison Company,* 419 U.S. 345 (1974) and many of the other cases decided in that they concern persons and corporations engaged in business and activities carried on for profit, whereas St. Xavier High School is a corporation not for profit engaged in a public or charitable activity. Consequently doctors, optometrists, lawyers and grocers which the Court likewise found on P. 354 not to be governmental or public in nature would not constitute State action. The mere fact that they, like Metropolitan Edison Company, a utility, were licensed by the State did not make them subject to the United States Constitution.

Where the activity was not of a business nature as in

Terry v. *Adams,* 345 U.S. 461 (1953), or *Evans* v. *Newton,* 382 U.S. 296 (1965) which involved the operation of a private park of a public nature, this Court had no difficulty in determining that such activities carried on by private persons were subject to the Fourteenth Amendment of the United States Constitution.

Also, there is considerable logic in concluding that the Fourteenth Amendment, as well as other provisions of the Constitution are enforceable against private citizens, as well as against states. This Court has recognized the validity of this argument in *Griffin* v. *Breckenridge,* 403 U.S. 88 wherein it upheld the validity of the Civil Rights Act.

Ohio has a compulsory school attendance law which requires compulsory attendance of young people from six to eighteen years of age in schools which must meet the curriculum and other requirements of the Ohio law and the regulations of the Ohio Board of Education *(3321.04 O.R.C.* and *3321.07 O.R.C.* appended hereto on p. 5a of the Appendix.)

A parent who fails to send his child to school in violation of *Section 3321.04 O.R.C.* is subject to criminal punishment under *Section 3321.38 O.R.C.* and *3321.99 O.R.C.*

Section 3321.04(C) O.R.C. provides:

> "The board of education of the city, exempted village, or county school district in which a public school is located *or the governing authorities of a private or parochial school* may in the rules governing the discipline in such schools, prescribe the authority by which and the manner in which any child may be excused for absence from such school for good and sufficient reasons.
>
> The state board of education may by rule prescribe conditions governing the issuance of excuses, which

shall be binding upon the authorities empowered to issue them."
(Emphasis Ours)

Section 3321.04(c) O.R.C. is particularly important because it indicates that the State of Ohio has conferred disciplinary powers to suspend students in private or parochial schools. A suspension of a student is a valid excuse for his non-attendance. While this Court has recognized that "education is perhaps the most important function of state and local governments", *Brown* v. *Board of Education*, 347 U.S. 483, 493, it has also recognized that "Parochial schools, in addition to their sectarian function, perform the task of secular education". Thus, Head Note No. 3 of *Board of Education of Central School District* v. *Allen, Commissioner*, 392 U.S. 236, is as follows:

> "Parochial schools, in addition to their sectarian function, perform the task of secular education, and, on the basis of this meager record, the Court cannot agree with appellants that all teaching in a sectarian school is religious or that the intertwining of secular and religious training is such that secular textbooks furnished to students are in fact instrumental in teaching religion. Pp. 245-248."

The Petitioners have not found any decision of this Court where the issue raised by them as to the right of "due process" in disciplinary proceedings in private schools has been determined by this Court. No First Amendment rights were asserted by the Respondents at any time in any of the proceedings in the State Courts.

The decision of this Court in *National Labor Relations Board* v. *The Catholic Bishop of Chicago*, No. 77-752 decided March 21, 1979, is not controlling in this case. As the Court pointed out, the relationship between the

Catholic school and its teachers was unique and vital to the existence of the school, so that the attempt to compel collective bargaining would violate First Amendment rights.

It is not the intention or purpose of the Petitioners to control the discretion of St. Xavier High School in the discipline of its students. All that the Petitioners seek is procedural fairness, namely the right to be heard at a meaningful time in a meaningful manner before unbiased and unprejudiced persons. St. Xavier High School had such machinery available in the form of a Disciplinary Board, which it did not employ.

The only available decisions to date have been of Courts inferior to this Court and their decisions have not been unanimous. Some have upheld and others have denied "due process" in the case of private and parochial schools.

The authorities to the effect that there is a right to "due process", or the right to a fair hearing are

Buckton v. *National Collegiate Athletic Association*, 366 F. Supp. 1152 (D.C. Mass.) involving the right of students to engage in intercollegiate athletics at Boston University, a private denominational institutional.

Slaughter v. *Brigham Young University*, 514 F. (2d) 622, relating to disciplinary proceedings in a Mormon University.

Belk v. *Chancellor of Washington University*, 336 F. Supp. 45 (E.D. Mo.) dealing with Washington University, a private school at St. Louis.

Presseisen v. *Swarthmore*, 71 F.R.D. (E.D. Pa.) concerning Swarthmore College, a private institution in Pennsylvania.

Hammond v. *University of Tampa*, 344 F. (2d) 951, involving a private institution which made use of city surplus buildings.

In addition, legal scholars have commented very strongly that the public function of education in and of itself by a private school is sufficient to subject it to the Fourteenth Amendment of the United States Constitution. In *81 Harvard Law Review 1045, 1060* this position is thus stated:

> "Rather than examine separately the connections between each school or department and the state, all private schools might be found subject to the fourteenth amendment on the ground that they fulfill a 'public function'."

Other pertinent portions of this Law Review Article are as follows on P. 1060:

> "Analogous reasoning suggests that state action may be found where a state's own allocation of educational resources is planned in relation to, and influenced by, the number of children in private and parochial schools; where official accreditation and laws enabling the schools to grant diplomas provide a legal setting for the private schools; and where tax exemptions and other forms of aid such as bussing support the schools so that they can continue to do their share."

Likewise on P. 1061:

> "A stronger case can be made for grade and high schools where the states have actively undertaken to provide all children with schooling, especially since education is considered vital in the preparation for future participation in the democratic process."

In accord is *48 N.Y.U. Law Review 1151, 1146*:

> "The public function doctrine provides a potential means of avoiding the shortcomings inherent in traditional fourteenth amendment theories of state action. This doctrine focuses on the nature of a challenged activity, rather than on the nature of the state's involvement with the entity performing or intimately connected with that activity. Under the doctrine, when private entities undertake to exercise powers or functions governmental in nature, they become instruments of the state and are thus subject to fourteenth amendment limitations . . .
>
> . . . The public function doctrine might be used to establish fourteenth amendment jurisdiction over private schools. Private schools perform educational tasks which are usually performed by the state."

To the same effect that private education is a public function is *20 Case – Western Reserve Law Review 378, (1969)*.

It cannot be overemphasized that the failure to accord "due process" to students has the same undesirable and deleterious effect regardless of whether the school is private, parochial, or public – which is the more reason for the application of the Fourteenth Amendment. The results which this Court has deplored in cases involving lack of "due process" in schools are exactly the same regardless of the nature of the school in a sphere of the greatest public concern. Education is not a private matter. The public policy of the state is involved.

This point was developed at the trial of this case in the testimony of Dr. Claroy Pruden, Professor at the Graduate School of Xavier University, who teaches the subject of discipline. The following is an excerpt of her testimony:

> "Q. What importance, if any, do you ascribe to an opportunity for a fair and impartial hearing that accords the student the opportunity to defend himself, present proof before unbiased people who will determine the penalty?
>
> A. Are you asking my opinion?

Q. Yes, and I'm talking about children.

A. All right. Basically I feel that a student, for whatever transgression, has a right to defend themself, has a right to discuss the prose and cons or has the right to make amends for their error or transgression, whatever you want to call it.

I feel that punishment that is meted out in a controlled situation in the sense that it totally and completely cuts the student off from any form of retribution or what have you — is negative."

She also testified as to the effect of expulsion:

"However, for a student that has positive feelings about the educational process and about the learning process, this can have very detrimental and very negative effects upon that student in that they feel that their education has been terminated. They may — and if it is a bright, well-adapted student, one with good ego functioning, they may well begin to seriously question authority, they may begin to question Christian principles and may, really, really question their own motivation in terms of has all this been worth it, you know, the work that I've done."

The Respondents have pictured in the State Courts the dire consequences of the interference of courts in the discipline of private and parochial schools. As in the dissenting Opinions in this Court in cases which extended "due process" and Constitutional rights in public schools, they proclaimed that "due process" would cause drastic interference with the operation of the schools, multiplicity of legal actions, timidity on the part of teachers and school administrators, and many other serious consequences which have not occurred. Public schools still exist and the Constitution of the United States prevails.

In spite of their dissents, the dissenting justices have recognized the importance of school discipline for the training of good citizens. We refer to *Goss* v. *Lopez*, 419 U.S. 565, 593, wherein the following appears:

"The classroom is the laboratory in which this lesson of life is best learned."

Mr. Justice Black summed it up:

"School discipline, like parental discipline, is an integral and important part of training our children to be good citizens — to be better citizens." Tinker, 393 U.S., at 524, 89 S. Ct. at 746 (Dissenting opinion).

Petitioners' position that good citizenship is promoted only by fair discipline is echoed by *58 Marquette Law Review, 703, 739,* in which it is stated:

"Students have a peculiar need for receiving fair treatment. In a time when the 'system' is being challenged on all fronts, students are looking for evidence that they live in a fair society in which rules, not the arbitrary action of men, governs. If their first contact with the 'system' results in feelings of unfairness and bitterness, the damage done may be irreparable."

17,704,000 students enrolled in private or parochial schools at primary and secondary levels bear witness to the importance of the question involved, namely the right of students in such schools to "due process" and to be treated fairly by according them "procedural fairness" in disciplinary proceedings.

The Ohio courts have recognized that students have a right to be treated fairly by private schools and are entitled to procedural fairness and "even handed justice" in the matter of discipline, *Koblitz* v. *Western Reserve University,*

21 Oh. Cir. Ct. 144 P. 158 and *Schoppelrei* v. *Franklin University*, 11 Oh. App. (2d) 62.

In this regard, it must be pointed out that Mark and his father were denied "due process" for the further reason that the grounds for expulsion set forth in the Student Handbook and which the Court found authorized his expulsion were vague and lacked definiteness. Neither "conduct detrimental to the reputation of the school" nor "Immorality in talk or action" meet the Constitutional requirement as to what conduct is prohibited or give notice of the kind of conduct which is ground for expulsion. Since the trial judge considered Mark's guilt on the basis of the Criminal Statutes of the State of Ohio, the same standards should be applied as govern such cases. Such vague language denies the offender "due process", *United States* v. *Harriss*, 347 U.S. 612, and *Raley* v. *Ohio*, 360 U.S. 423. Specificity is absolutely required in disorderly conduct and breach of the peace statutes and regulations, *Cox* v. *Louisiana*, 379 U.S. 536 and *Garner* v. *Louisiana*, 368 U.S. 157.

Mark's graduation from another high school will not render this case moot since a real viable controversy would still be pending before the Courts.

The First Count of the Complaint asked for relief which was not limited to his restoration as a student, but also asked "for all other relief to which the Plaintiffs may be entitled either at law or equity".

The Second Count of the Complaint asked the Court *"to declare whether the attempted expulsion was in violation of the contractual relation between the Plaintiffs and Defendants or otherwise was valid and in accordance with law, and to grant all relief proper and necessary in this cause, including setting aside the alleged expulsion"*. (Emphasis Ours)

Under the prayer for relief it is clear that the Plaintiffs sought a determination as to the validity of the expulsion and to have it expunged from the record if it was invalid, as well as other relief which could conceivably include a claim for money damages for breach of contract. *2721.09 O.R.C.* provides for the granting of "further relief based on a declaratory judgment or decree previously granted by way of a separate petition to the Court".

The expunction of the expulsion from the records after the graduation of a high school student is still available as a remedy which prevents the case from being moot, *Board of School Commissioners of the City of Indianapolis* v. *Jacob*, 420 U.S. 128. The fact that some relief can still be granted prevents the case from being moot, *Franks* v. *Bowman Transportation Company*, 424 U.S. 753, 756, *American Life and Accident Insurance Company of Kentucky* v. *Jones*, 152 Oh. St. 287, 297, *Miner* v. *Witt*, 82 Oh. St. 237, and *Culver* v. *City of Warren*, 84 Oh. App. 373, 393.

CONCLUSION

Petitioners submit that the question on appeal is such as to clearly show that their rights under the Constitution of the United States have been violated in more than one respect and the immunities and privileges which are granted by the Constitution of the United States have been completely denied to them. Questions of great concern have been raised which are national in character and which should be determined.

No questions of First Amendment rights is involved in this case. None was ever raised in the State Courts.

This Court has shown an increasing awareness of the rights of young people. In *In Re Gault*, 387 U.S. 1, the

rights of juveniles in criminal proceedings were placed on a par with those of adults. In addition, this Court has upheld the rights of students in parochial schools to books, transportation, and other services equal to those of public schools, while at the same time placing restraints on the parochial schools themselves, *Wolman* v. *Walter,* 433 U.S. 229.

The right of parents to send their children to parochial schools is not a matter of freedom of religion under the First Amendment, but rests entirely on the right of parents to direct the upbringing and education of their children which this Court recognized was a "Due Process" right under the Fourteenth Amendment, *Pierce, Gov. of Oregon* v. *Society of Sisters,* 268 U.S. 510.

Similarly, the Petitioner, Joseph A. Geraci bases his right to the continued education of his son at St. Xavier High School on the Fourteenth Amendment to the United States Constitution. Moreover, the failure of the Ohio Courts to follow its precedents entitling the student in a private school to procedural fairness, the equivalent of "due process" was in violation of the Fourteenth Amendment. The failure of the state judiciary to afford "due process" is a violation of the Fourteenth Amendment, *NAACP* v. *Alabama,* 357 U.S. 449; *Shelley* v. *Kraemer,* 334 U.S. 1.

The pre-judgment by the Respondents as to the penalty is the most injurous aspect of the proceedings. In advance of the meeting with the Petitioner, they chose the most extreme of four possible penalties, namely "jugging" (detention), demerits, suspension and expulsion. This case would not have arisen if any of the lesser penalties had been chosen.

The importance of affording fairness to young people has been emphasized by this Court on more than one occasion. In 1943, Mr. Justice Jackson wrote:

> "The Fourteenth Amendment, as now applied to the States, protects the citizens against the State itself and all of its creatures — Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits to the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 637.

"Due process of law is the primary and indispensable foundation of individual freedom . . ." As Mr. Justice Frankfurter has said:

> "The history of American freedom is, in no small measure the history of procedure."
>
> "Under our Constitution, the condition of being a boy does not justify a kangaroo court."
>
> "Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces." *In Re Gault,* 387 U.S. 1, 20, 28, 45.

Moreover, *Lockett* v. *State of Ohio,* 98 Sup. Ct. Rep. 2954, demonstrates that the Respondents did not accord Mark the same consideration which this Court has decided must be given to even the worst criminals. Reference is made to the fact that in capital cases a state statute is unconstitutional and a person is deprived of "due process" because the Court is not permitted to consider all extenuating circumstances including lack of intent, whether the

offender was a principal or an accomplice, and the prior record before imposing sentence.

Further, this Court has consistently held that "due process" cannot be denied on the ground that "due process" would have led to the same result or because the party was guilty, *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413; *New England Divisions Case,* 261 U.S. 185; *Armstrong* v. *Manzo,* 380 U.S. 545.

Millions of students in private and parochial schools and their parents want to know what their rights are in disciplinary proceedings. It is a vital issue for them as to whether they are to be treated fairly and given "due process" as is due a citizen in a democracy, or instead to be ruled by arbitrary fiat.

This Court should take jurisdiction because it has never decided the issue of whether the Fourteenth Amendment applies to private or parochial schools. The furthering of good citizenship of students by the practice of democracy and fair dealing by private schools is reason enough why this vital issue should be considered. Dr. Claroy Pruden, Professor of the Graduate School of Xavier University, a Catholic Jesuit Institution, testified at the trial that courses relating to educational discipline which she teaches at the University attended largely by Catholic teachers and administrators emphasized the necessity and propriety of according students "due process". In addition, the financial considerations caused by the transfer of students from Catholic schools to public schools by reason of unfair disciplinary procedures in such schools could conceivably create havoc with the public school system. 17,704,000 students attend private and parochial schools, and 43,346,000 attend public schools.[1]

[1] 1978 Statistical Abstract of the United States published by United States Department of Commerce, Bureau of the Census.

While there is language in prior decisions indicating the Court's view with regard to private and parochial schools, the same constitute obiter dictum and are not binding on this Court, *Carroll* v. *Lessee of Carroll,* 57 U.S. 275; *Pacific Steamship Company* v. *Peterson,* 278 U.S. 130.

Petitioners submit that a Writ of Certiorari should issue to the Supreme Court of Ohio for review of the final orders and judgments entered by it on March 23, 1979.

Respectfully submitted,

Hyman B. Rosen of Rosen and Rosen,
Trial Attorney for Petitioners,
Mark W. Geraci and Joseph A. Geraci,
1005 First National Bank Building,
Fourth and Walnut Streets,
Cincinnati, Ohio 45202
(513) 621-0828

APPENDIX A

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1979 TERM
City of Columbus.) To wit: March 23, 1979

MARK W. GERACI, A MINOR,
Appellants,

vs.

ST. XAVIER HIGH SCHOOL ET AL.,
Appellees.

No. 79-136

APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of
..... 19.....
..... Clerk
..... Deputy

APPENDIX B

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1979 TERM
City of Columbus.) To wit: March 23, 1979

MARK W. GERACI, A MINOR,
Appellants,

vs.

ST. XAVIER HIGH SCHOOL ET AL.,
Appellees.

No. 79-136

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR HAMILTON COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Hyman B. Rosen

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of
..... 19.....
..... Clerk
..... Deputy

APPENDIX C

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
AND
THE SUPREME COURT OF THE STATE OF OHIO

NO. C-780581

MARK W. GERACI, A Minor
By and Through
JOSEPH A. GERACI, His
Father and Next Friend,

and

JOSEPH A. GERACI,
Plaintiffs-Appellants,

vs.

ST. XAVIER HIGH SCHOOL,
REV. PAUL BORGMANN,
MICHAEL D. TRAINOR,
THOMAS A. MEYER,
REV. ROBERT O'CONNER,
RICHARD B. BERNING,
RICHARD J. PIENING,
JAMES F. CAHILL,
REV. DANIEL L. FLAHERTY,

and

SOCIETY OF JESUS,
Defendants-Appellees.

NOTICE OF APPEAL

(Filed Court of Appeals January 22, 1979)

Come now Plaintiffs-Appellants Mark W. Geraci, presently eighteen years of age, and Joseph A. Geraci, and give Notice of Appeal from the judgment entered in the Court of Appeals of Hamilton County, First Appellate District of Ohio on the 27th day of December, 1978, which affirmed the judgment in favor of the Defendants-Appellees and against the Plaintiffs-Appellants, rendered by the Court of Common Pleas of Hamilton County, Ohio. Said Appeal is to the Supreme Court of Ohio.

This case is one which did not originate in the Court of Appeals.

This case involves a substantial Constitutional Question, concerning namely the Fourteenth Amendment of the United States Constitution and is of public or great general interest.

/s/ HYMAN B. ROSEN
Hyman B. Rosen of Rosen and Rosen,
Trial Attorney for Plaintiffs-Appellants,
1005 First National Bank Building,
Fourth and Walnut Streets,
Cincinnati, Ohio 45202
621-0828

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX D

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-780581

MARK W. GERACI, A Minor
By and Through
JOSEPH A. GERACI, His
Father and Next Friend,

and

JOSEPH A. GERACI,

Plaintiffs-Appellants,

vs.

ST. XAVIER HIGH SCHOOL,
REV. PAUL BORGMANN,
MICHAEL D. TRAINOR,
THOMAS A. MEYER,
REV. ROBERT O'CONNER,
RICHARD B. BERNING,
RICHARD J. PIENING,
JAMES F. CAHILL,
REV. DANIEL L. FLAHERTY

and

SOCIETY OF JESUS,

Defendants-Appellees.

APPEAL FROM THE COURT OF COMMON PLEAS HAMILTON COUNTY, OHIO

OPINION

(Filed December 27, 1978)

Messrs. Rosen and Rosen, Hyman B. Rosen of counsel, 1005 First National Bank Buiding, Fourth and Walnut Streets, Cincinnati, Ohio 45202, for Plaintiffs-Appellants.

Messrs. Dinsmore, Shohl, Coates and Deupree, Gary D. Bullock and William L. Blum of counsel, 2100 Fountain Square Plaza, 511 Walnut Street, Cincinnati, Ohio 45202, for Defendants-Appellees.

BETTMAN, J.

Appellants, Mark Geraci and his father, brought this action for a declaratory judgment and for injunctive relief against appellees, St. Xavier High School and various officials thereof, seeking to have Mark reinstated as a student in good standing in said high school. St. Xavier is a private, parochial, college preparatory school operated by the Society of Jesus. It admits students of any race, color, national or ethnic origin, or religious affiliation. Mark was a student from his freshman year (9th grade) until his expulsion on June 2, 1978, the end of his junior year. This appeal raises basically two issues. First, whether appellants' constitutional right to due process has application to the conduct of disciplinary proceedings by a private school. Secondly, whether appellees' handling of Mark's expulsion was arbitrary and unreasonable and therefore a breach of appellants' contract of enrollment.

Appellants' first assignment of error complains that the trial court erred in holding that St. Xavier's disciplinary proceedings are not controlled by Fourteenth Amendment due process requirements.

Historically, our government has permitted all private associations to operate free of government interference except in those situations where the actions of these associations may have broad societal effects. As a result of this policy of minimal governmental interference, private schools have been allowed to control their own affairs as long as they met basic standards in education. The Fourteenth Amendment has been applied in a manner consistent with this tradition.

The due process requirements of the Fourteenth Amendment are only applicable to situations involving "state action." The basic issue raised by this assignment is therefore whether St. Xavier's disciplinary proceedings constitute state action. It has been clearly established that a student facing misconduct charges in a public high school is entitled to the protection of the Fourteenth Amendment. *Goss* v. *Lopez* (1975), 419 U.S. 565. A determination of whether the actions of a "private" school constitute state action requires an analysis of all the facts and circumstances of the case.

Courts have employed several modes of analysis in determining whether public or private action is involved. State action will be found "in the exercise by a private entity of powers traditionally exclusively reserved to the State;" *i.e.* if this entity is performing a "public function." *Jackson* v. *Metropolitan Edison Co.* (1974), 419 U.S. 345, 352. Education is not now and has never been an exclusive function of the state. *Lorentzen* v. *Boston College* (D. Mass. 1977), 440 F. Supp. 464, *aff'd* (1st Cir. 1978), 577 F.2d

720; *Powe* v. *Miles* (2d Cir. 1968), 407 F.2d 73.[1] Privately controlled and administered educational institutions have a long and distinguished history in this country.

Where, as in this case, the enterprise in question is regulated by the state, state action will be found if there is "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson, supra* at 351. This mode of analysis would here focus on the specific action of expulsion from St. Xavier. The state regulation of St. Xavier is relatively minimal. Our attention has been directed to nothing indicating state involvement in St. Xavier's disciplinary process. To the extent that appellant may be correct in asserting that a private school's decision to suspend or expel a student is sanctioned by R. C. 3321.04(C), this still does not involve the state in the decision-making process.

Even without state involvement in the disciplinary proceedings, state action may still be found if the state is so entwined with the administration and operation of the school that a "symbiotic relationship" has developed. *Jackson, supra* at 357; *Burton* v. *Wilmington Parking Authority* (1961), 365 U.S. 715. Determining whether a symbiotic relationship has developed requires an analysis of all the facts and circumstances of the state's involvement with St. Xavier.

St. Xavier is approved by the state as a high school. It files annual reports with the state dealing with its curriculum, class loads, number of teachers, etc. The teachers at St. Xavier all have state certificates of qualification. The state provides, on loan, certain standard textbooks and

[1] We find the circumstances and reasoning of *Buckton* v. *National Collegiate Athletic Association* (D. Mass. 1973), 366 F. Supp. 1152 inapposite.

furnishes transportation to students. The school is exempted from state taxation. However, other than ascertaining that the school meets minimum state standards for a high school, the state exercises no control over the school whatsoever. This is certainly not the sort of pervasive state involvement required for a finding of a symbiotic state action. See *Powe* v. *Miles* (2d Cir. 1968), 407 F.2d 73; *Rackin* v. *Univ. of Pa.* (E. D. Pa. 1974), 386 F. Supp. 992.

Our conclusion that there is no state action in the disciplinary proceedings of a private high school such as St. Xavier is supported by *Wisch* v. *Sanford School, Inc.* (D.C. Del. 1976), 420 F. Supp. 1310; *Bright* v. *Isenbarger* (N.D. Ind. 1970), 314 F. Supp. 1382; and a long line of federal cases involving private universities. The assignment is, accordingly, overruled.

Appellants' assignments of error two, three and four maintain that the trial court erred in finding that the contract between the parties was breached by Mark's conduct and not by the procedures used by appellees in determining to expel him.

Mr. Geraci had paid Mark's tuition for his junior year and made the required deposit toward the senior year tuition. The parties are in agreement that this gave rise to a contract that St. Xavier would continue to provide education to Mark so long as he met its academic and disciplinary standards. They are further in agreement that the catalogue, describing St. Xavier High School's academic program and its standards and requirements constituted a part of the terms and conditions of such contract. The catalogue (Exhibit 1) provides in pertinent parts:

> By the act of registering at St. Xavier High School, a student and his parents (or guardians) understand and agree to pursue the educational objectives and

practices as stated in this catalogue and to observe the disciplinary code of the school.

* * *

Disciplinary Norms

The St. Xavier norms of conduct are predicated on two premises: first, that every student has the right to certain situations (such as the protection of his personal property, the physical integrity of the facilities, an atmosphere conducive to personal growth and development) and, second, that every student has the duty to preserve these rights for others. The underlying concept is not one of legalisms, punishments, or discipline for discipline's sake. Rather, it is one of personal and corporate privileges bound of necessity to personal and corporate responsibilities. Since no list of norms can cover every situation, the administration presumes that common sense, mature judgment, and Christian charity are the guides by which every St. Xavier student should measure his actions.

The assistant principal is in charge of all matters of discipline, . . .

* * *

Expulsion The following offenses are grounds for expulsion:

1. conduct detrimental to the reputation of the school. . . .
8. immorality in talk or action.

* * *

Appellants understood that Xavier maintained high standards of deportment.

The evidence before the trial court was as follows. On the final day of the school year Tom McKenna, a student at Moeller High School, entered St. Xavier High School,

went to the classroom where Mark Geraci and his classmates were taking a final test and threw a meringue pie in the face of Mr. Downie, the teacher. Pandemonium ensued involving teachers and students. By Mark's own testimony, several weeks before he and some fellow students had decided it would be a "funny prank" to get McKenna to "pie" Mr. Downie. "I called Tom . . . and he said he would go along with it." The original plan was that Mark would collect $50.00 from the group to pay McKenna. He did not, however, collect any money. Nevertheless, the evening preceding the last day of school, when Mark called McKenna to ask him to a party, McKenna asked "whatever happened about the pie throwing." Geraci told him he had not collected any money and McKenna said "he might come over and do it anyway." Mark made no response to this statement. On McKenna's inquiry Geraci told him the room number of the class where Mr. Downie would be teaching and, on further inquiry, which door of the building to enter. At McKenna's request, Geraci called another Moeller student to arrange for transportation for McKenna.

The very recital of the above facts makes abundantly clear that Geraci aided and abetted McKenna's throwing of the pie in the face of his teacher, Mr. Downie, an act patently "immoral," "detrimental to the reputation of the school" and violative of Geraci's acknowledged duty to exercise "common sense, mature judgment, and Christian charity." The trial court's finding that Geraci's acts constituted a breach of the contract with St. Xavier is, therefore, fully supported by the evidence.

Although, as hereinbefore discussed, a private school's disciplinary proceedings are not controlled by the due process clause, and accordingly such schools have broad discretion in making rules and setting up procedures for their

enforcement, nevertheless, under its broad equitable powers a court will intervene where such discretion is abused or the proceedings do not comport with fundamental fairness. *Schoppelrei* v. *Franklin University* (10th Dist. 1967), 11 Ohio App. 2d 60, 228 N.E.2d 334; *Koblitz* v. *Western Reserve* (8th Dist. 1901), 11 O.C.D. 515, 21 O.C.C. 144.

The record shows that Mr. Meyer, the Assistant Principal of Xavier in charge of discipline, called Mark to his office several hours after the event. At that time Mark, though protesting that he did not really expect McKenna to go through with it, admitted substantially all the elements of his involvement, hereinbefore set out. Meyer forthwith advised him that he was expelled. The transcript further shows that before this decision was finalized Mr. Meyer, Mr. Trainor, the Principal, and Father Borgmann, President of St. Xavier, all discussed and considered the matter; that Meyer discussed it with Mr. Geraci; that Trainor discussed it with Mr. Geraci and that Father Borgmann discussed it with both father and son. The testimony as to these discussions shows an appreciation and consideration by appellees of Mark's previously unblemished disciplinary record and his academic excellence, an understanding of how much Xavier meant to appellants and a genuine human concern for them. On the basis of the record we cannot say that appellees abused their discretion nor that the procedures were unfair.

The trial court did not err in holding that Mark's expulsion was just, proper, and in accordance with the contract between the parties and did not constitute an abuse of discretion. Assignments two, three and four are overruled.

The fifth and sixth errors assigned deal with the admission and exclusion of evidence. We have considered them and find the court's rulings not prejudicial to the

rights of appellants. The final assignment suggests that the judgment is contrary to the manifest weight of the evidence. This has, in effect, been disposed of in our previous discussions. Assignments five, six and seven are overruled. The judgment of the trial court must accordingly be affirmed.

PALMER, P. J. and CASTLE, J., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

APPENDIX E

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-780581

MARK W. GERACI, A Minor
By and Through
JOSEPH A. GERACI, His
Father and Next Friend,

and

JOSEPH A. GERACI,

Appellants,

vs.

ST. XAVIER HIGH SCHOOL,
REV. PAUL BORGMANN,
MICHAEL D. TRAINOR,
THOMAS A. MEYER,
REV. ROBERT O'CONNER,
RICHARD B. BERNING,
RICHARD J. PIENING,
JAMES F. CAHILL,
REV. DANIEL L. FLAHERTY,

and

SOCIETY OF JESUS,

Appellees.

JUDGMENT ENTRY

(Entered December 27, 1978)

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Opinion filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Opinion attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellants, by their counsel, except.

APPENDIX F

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-780581

MARK W. GERACI, A Minor, ET AL.,
Appellants,

vs.

ST. XAVIER HIGH SCHOOL, ET AL.,
Appellees.

ENTRY OVERRULING MOTION TO REQUIRE COURT TO PASS ON ASSIGNMENTS OF ERROR AND OVERRULING APPLICATION FOR RECONSIDERATION.

(Entered January 25, 1979)

This cause came on to be heard upon the motion of the appellant to pass on Assignments of Error Nos. 5 and 6 and upon the application of the appellant for reconsideration of this Court's decision and judgment entered herein and upon the memoranda of the appellee in opposition thereto, and

The Court being fully advised in the premises finds that said motion and application are not well taken and that the same ought to be and hereby are overruled.

APPENDIX G

STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

CASE NO. A-7806922

MARK GERACI,
PLAINTIFF

vs.

ST. XAVIER HIGH SCHOOL ET AL.,
DEFENDANTS

DECISION

(August 28, 1978)

MARRS, J.

This matter came on for hearing to the court on complaint of the plaintiffs asking for a restraining order to prevent Mark Geraci from being expelled from St. Xavier High School and in the second cause of action to declare his and his father's rights under a contract implied by the payment of tuition to the defendant school.

Evidence, exhibits, stipulations, and arguments were received and heard by the court. These created issues which are as follows:

(1) A question of fact as to whether Mark Geraci had abandoned the pie throwing event or had the McKenna youth undertaken the matter on his own?

(2) Does "Due Process", a constitutional right given to

citizens of the United States extend to the citizens relationship with a private educational institution of his own choosing?

(3) Does a contractual relationship exist where a parent pays tuition for his child to a private institution and if so, does that relationship require and imply safeguards against the summary expellment of said child?

(4) Did the expulsion procedure followed by the school authorities constitute an abuse of discretion and therefore the action taken was arbitrary, capricious and unreasonable?

(1) First Issue

The evidence shows that about three weeks prior to the end of the school year, a group of some 8 or 10 students were having lunch in the Cafeteria of St. Xavier High School, a private parochial college preparatory school for young men. Someone came forth with an idea (apparently copied from an episode at the 1977 Ohio State Fair wherein a pie was thrown which struck the Governor of the State) to "pie" Mr. Downie, an English teacher at the high school. The plaintiff Mark Geraci, was a close friend of one Tom McKenna (now deceased accidentaly by means totally unrelated to this case) and called the said McKenna suggesting the "pie throwing idea" and indicated to Tom that the boys would be willing to pay him for doing the job. Tom liked the idea, thought it would be fun and agreed to do the act. Mark Geraci in the next few weeks was approached by several of the boys who offered money to Mark but according to his story, he refused to accept. However, the night before the unhappy event occurred, Mark Geraci called up Tom McKenna inviting him to a party and the subject matter of the pie

throwing came up. Geraci relates that Tom was still enthused and agreed to do it without pay. Geraci, according to his testimony told Tom about the room location and class time. (Tom was not a student at St. Xavier) Geraci also related that he told Tom about a door at the corner of the building that he could use as an escape route. Tom also said he needed a ride to the school and agreed to do it if he had the time as he was going "bridge jumping" at Morrow, Ohio. Another friend, Chuck Folzenlogen was then called by Mark to arrange for Tom's transportation (See Patricia Geraci deposition P11-12). Mark Geraci by his testimony claims that he then abandons the incident because he doesn't know, so he says, that Folzenlogen would drive Tom to the school and secondly whether Tom would even have the time to do the job. However, Tom did arrive at the agreed time and place to do the pie throwing.

The court would find from the evidence as a trier of the fact that Mark Geraci did not abandon the plan. He had not abandoned the plan when *after* talking with McKenna on the night before Mark called Folzenlogen to arrange a ride for Tom. When Tom showed up and threw the pie, Mark had done nothing to show an abandonment of the plan. Mark had not told Mr. Downie, Mr. Meyer or anyone including his parents of the plan in advance so that the idea could have been quashed. Mark let it proceed in the natural course of events as initially had been discussed. Mark is the only one claiming abandonment. It now becomes a matter of belief. Mark never at any time told his mother, father, or the school authorities the full extent of his involvement. Only after legal proceedings were underway was it discovered that he had given the escape route to McKenna. That just *coincidently*? Folzenlogen was the driver of the car that brought McKenna to

St. Xavier after Mark had called him the night before. The evidence convinces this court that Mark Geraci was an aider and abettor to the pie throwing affair. The criminal law defines an aider and abettor as one "who aids, helps, assists, encourages, directs, associates himself with another for the purpose of committing the act. Such person is regarded as if he were the principal offender and is just as guilty as if he had performed every act constituting the offense. When two or more persons have common purpose to commit a crime and one does one part and another performs a second, those acting together have the purpose or knowledge required."

"Proof of motive is not required. (Whether prank or intended assault) The presence or absence of motive is one of the circumstances bearing on purpose or knowledge."

"Purposely" is defined 'When it is the specific intention to bring about a certain result. A person acts purposely when the gist of the offense is a prohibition against conduct of a certain nature regardless of what the offender intended to accomplish thereby, if it is his specific intention to engage in conduct of that nature".

"Purpose is a decision of the mind to do an act intentionally and not accidently."

Applying these principles to the instant case as well as "the purpose with which a person does a certain act is determined from the manner in which it was done, the means used and all other facts and circumstances in evidence", this court can only conclude that Mark Geraci continued throughout to be a part of the plan.

(2) Second Issue

Evidence in this case shows that St. Xavier High School is a State of Ohio approved high school, its students are subject to the compulsory education laws, uses only State

certified teachers, owns tax exempt properties, receives public transportation subsidies, participates and receives on loan at no expense to it, a book lending subsidy from the Public local school district and other municipal subsidies.

In examining the meager case law on this subject, the court in Wisch v. Sanford School Inc., 420 F.Supp. 1310 (Delaware 1976) defined whether or not a school institution was subject to the "due process" clause by applying the following tests:

"The State must have either *significant control* over an input into the *policy* making process of the private institution, or be so *involved* in the financing and running of the institution that it in effect facilitates the constitutional violation complaint of."

Examinations of the cases cited in the well prepared briefs by the attorneys for the plaintiffs as well as those of the defendants compells this court to find from the evidence in this case, that the "Due Process" Clause is not applicable because the assistance received from the State of Ohio by St. Xavier High School is minimial and indirect and that the State has nothing to say about its policy input or about its disciplinary procedures. Likewise the State does not assist in its financing or fund raising or involve itself in any manner n the running of the School.

The facts in this case with regard to the issue of "Due Process" are similar to the case of Bright v. Isenberger, 314 F. Supp. 1382 (445 F 2nd 412) and when combined with the Wisch case (supra), this court would find that "Due Process" is not applicable to a private institution based on the evidence of this case.

(3) Third Issue

The facts indicate that Mr. Joseph Geraci, Mark's father, pays his son's tuition and has done so for three years. He

has also in accordance with the School's rules deposited 10% of the 1978-79 year in advance. This advance deposit was returned to him by the School when Mark was expelled but he has not accepted the return of the deposit. It is his claim that a contractual agreement is in effect between he and the school. That because of this contractual relationship he is afforded the opportunity of being present at any serious hearing concerning the disciplining of his son and especially at the hearing where his son is expelled from the school.

This court would find from the evidence that a contract does exist between Mr. Joseph Geraci and St. Xavier High School.

We must now examine the extent of that contractual relationship. To this end we must look at Plaintiff's Exhibit 1, the guide book outlining philosophy and objectives and setting forth the guidelines for behavior and discipline and also the extent of Mr. Geraci's knowledge and understanding of the contractual relationship.

Mr. Geraci took the witness stand and testified that he had attended St. Xavier High Schol and had graduated therefrom and then went on to graduate from Xavier University. He also related that 12 other members of his family had attended and graduated from St. Xavier High School including his oldest son, Mark's older brother. He testified he had not read the Guide Book but was aware of the discipline of the school.

In examining the guide book, on page 2, we find that "By registering at St. Xavier High School, a student and his parents understand and agree to pursue the educational objectives and practices as stated in the catalogue and to observe the disciplinary code of the School".

Page 14 of the book reveals the right of the individual student as well as the students duty. Also on this page

the Assistant Principal is in charge of *all* matters of discipline.

Page 15 outlines procedures on complaint of a student, that the case may be represented to the principal or the assistant principal.

It is to be specifically noted that "a student involved in off-campus conduct prejudicial to the reputation of the school is liable to expulsion".

Page 18 provides offenses for expulsion and No. 1 sets up "conduct detrimental to the reputation of the school." No. 8 provides for "immorality in talk or action".

Page 34 provides for a Disciplinary Board that serves only in an advisory capacity to the Principal. Any decisions of the Board are subject to his approval. Likewise the Board "advises the Assistant Principal for student affairs in matters touching on norms of conduct for students."

The evidence in the case shows that after Tom McKenna threw the pie, he attempted to escape after a struggle with Mr. Downie, that he kicked out a glass door (the suggested escape route) fisticuffs ensued and Tom was eventually subdued and taken to the police station where he involved Mark Geraci as his contact. The evidence further showed that Mark had gone home, told his mother about what Tom had done and his capture and that he was concerned about Tom. He likewise related to some degree that he was involved and should go back to school and explain it to Mr. Downie. Mr. Meyer, the Assistant Principal, called and said he wanted to talk with Mark and the mother asked Mark if she should accompany him. Mark said no, went to school, conversed with Mr. Meyer, the Assistant Principal, and related in part his implications. Mr. Meyer, had previously investigated the matter, had conversed with McKenna at the police station heard the implication of Mark, further discussed the matter with Mr. Trainor, the School

Principal. Reverend Borgman, the President of St. Xavier High School, had also investigated the matter and had likewise talked with Tom McKenna, Mr. Trainor and Mr. Meyer. These latter two men had decided on the punishment of expulsion if Mark were found to be implicated. Mr. Meyer conversed with Mark, gave him the opportunity to be heard and found him to be an instigator of the affair and expelled him. Mark and his father appealed to Mr. Trainor and finally both talked to Father Borgman who had the power to affirm or modify the punishment. He affirmed the decision of Mr. Meyer and the expulsion of Mark.

The plaintiffs now claim that the procedure outlined above violated the terms of the contract because the father was not allowed to be present at the hearing which resulted in the expulsion.

The court would find that under the system of the school's disciplinary procedures the father was not entitled to be present. He knew from his long association with the school (his own attendance and that of the older son, as well as other members of the family) what the procedures were and agreed to this when the boy was enrolled (Page 2 of the guide book). Likewise the mother having heard half the story from her son knew that when Mr. Meyer called, something of a serious nature was involved and she offered to accompany her son but he refused her offer and she let him go on his own to see Mr. Meyer.

The School gave Mark's father the opportunity of appeal as he was allowed to talk with Mr. Trainer and ultimately with Father Borgman, who apparently wanted time to think about the event and the drastic punishment meted out as he avoided confrontation with Mr. Geraci by a somewhat common ruse, that having his associates tell Mr. Geraci that he was "out of town". Father Borgman testified as to his concern over the effect of this episode on the individuals directly involved, the student body, the 61 other teachers and the overall 'effect in the future.'

This court would find that Mr. Geraci and his son received from the school, that procedure for handling disciplinary matters that the contract called for in the guide book.

(4) Fourth Issue

Did the expulsion procedure amount to an abuse of discretion?

The court thinks not! The episode flaunted the personal dignity of the teacher, Mr. Downie. It was an affront to the authority and prestige of the school itself. If such conduct was subject to expulsion if engaged in off-campus activities, certainly such conduct was subject to expulsion if engaged in while on campus.

Although the hearing itself was not held in the manner of those conducted by a court, yet the guide book says on Page 14 "The underlying concept is not one of legalisms, punishments, or discipline for disciplines sake". The court feels that Mr. Geraci knew what he was getting when he chose to send his son to St. Xavier High School. He elected this school and paid the tuition for a system which he apparently from his experience believed would produce a highly disciplined boy. Unfortunately, for all, it didn't.

The court would find there has not been an abuse of discretion as the matter was heard and reviewed, thought about, prayed about and the decision made should not be set aside by the court substituting its judgment in private affairs.

Relief prayed for is denied.

.....

JUDGE

APPENDIX H

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-7806922

MARK W. GERACI, A Minor,
By and Through
JOSEPH A. GERACI,
His Father and Next Friend,

and

JOSEPH A. GERACI,

Plaintiffs,

vs.

ST. XAVIER HIGH SCHOOL, et al.

Defendants,

JUDGMENT ENTRY

(Entered September 13, 1978)

This case came on to be heard on Plaintiffs' Complaint, the Answer of the Defendants, the Application of Plaintiffs for Preliminary and Permanent Injunction and other relief including the declaration of the rights, status, and legal relationship between the Plaintiffs and the Defendants as set forth in Plaintiffs' Complaint.

Whereupon, the Court, upon agreement of counsel for the parties, ordered the Application of the Plaintiffs for said injunctions to be consolidated with trial of the action

on the merits and the case proceeded to trial accordingly on the evidence and the pleadings and was submitted to the Court.

Upon consideration the Court finds:

1. That St. Xavier High School receives only minimal and indirect aid from the State of Ohio; that the State of Ohio is not involved in the disciplinary procedures or otherwise in the operation of St. Xavier High School; that St. Xavier High School is a private institution; and that the due process provisions of the XIVth Amendment to the United States Constitution are not applicable to the parties in this case.

2. That a contract for education did exist between Plaintiffs and St. Xavier High School; that Mark Geraci arranged for a third person to throw a pie at a member of the faculty while his class was in progress at St. Xavier High School; that Mark Geraci did not abandon such plan or take any steps to terminate such plan; that he continued throughout to be a part of such plan; and that, by his conduct, Plaintiff, Mark W. Geraci, breached such contract;

3. That Plaintiffs received from St. Xavier High School and those acting on its behalf that procedure for the administration of discipline to which they were entitled under the aforesaid contract and that St. Xavier High School has not acted in any manner such as to constitute a breach of such contract between it and Plaintiffs;

4. That, upon the evidence, the expulsion of Mark W. Geraci as a student at St. Xavier High School was just, proper, and in accordance with the contract between the parties, and did not constitute an abuse of discretion on the part of the school or any other Defendant herein.

It is therefore ordered and adjudged that all issues herein joined be and hereby are determined in favor of Defendants

and judgment is entered accordingly. Plaintiff is ordered to pay the costs herein.

.....

Judge

/s/ HYMAN B. ROSEN, Trial Attorney
for Plaintiffs

.....

Gary D. Bullock, Trial Attorney
for Defendants

APPENDIX I

EXCERPT FROM COMPLAINT
Court of Common Pleas, Hamilton County, Ohio

(Filed August 7, 1978)

Page 6:

(15) The actions of the Defendants in expelling and disciplining the Plaintiff or otherwise aiding therein, and by denying him a proper hearing as a student at St. Xavier High School were arbitrary, capricious, unreasonable, unlawful and in violation of the contractual relations between said parties and Plaintiff's rights, and failed to accord the Plaintiff due process and equal protection with other students at said School, as required by State and Federal laws.

APPENDIX J

EXCERPT FROM MEMORANDUM OF PETITIONERS
Court of Common Pleas, Hamilton County, Ohio
(Filed August 25, 1978)

Page 10:

It is undisputed that the courts must intervene to insure the rights of students in cases involving public schools. No case has reached the Supreme Court of the United States whose decision would be binding on this court in regards to the rights of courts as to private schools. However, there seems to be no reason why any distinction should be made between public and private schools, since admittedly they perform the same function. In view of the fact that there is no binding authority on the subject, the Plaintiffs can only reason by analogy. The United States Supreme Court by its numerous decisions on the subject is persuasive authority that where a private person or organization performs a function which is public in nature, such function constitutes State action. Consequently such persons or parties are subject to all the provisions of the United States Constitution, including rights under the Bill of Rights, Rights of Due Process, Equal Protection, and Rights of Citizens under the Thirteenth and Fifteenth Amendments.

APPENDIX K

EXCERPT FROM MEMORANDUM OF THE PETITIONERS IN THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT OF OHIO

(Filed October 5, 1979)

Page 8:

The Trial Court erred to the prejudice of the Plaintiffs when it held that the Constitutional rights of due process guaranteed by the Fourteenth Amendment of the United States do not extend to them.

Issues Presented for Review

First Issue

The Constitutional right of due process set forth in the Fourteenth Amendment of the United States applies to and is controlling in disciplinary proceedings by a private school against a student.

APPENDIX L

SECTION 2721.09 O.R.C.

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§ 2721.09 Further relief granted. (GC § 12102-8)

Whenever necessary or proper, further relief based on a declaratory judgment or decree previously granted may be given. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application is sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

HISTORY: GC § 12102-8; 115 v 496, § 8. Eff 10-1-53.

Comment

By this section, any interested person may apply to a court for further relief based upon a declaratory judgment or decree previously entered. It is reported that in some cases a request for a declaration is accompanied by a prayer for coercive relief, such as injunction or other relief. Under this section such relief may be petitioned after the declaratory decree has been entered.

APPENDIX M

SECTION 3321.04 O.R.C.

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§ 3321.04 Compulsory attendance.

Every parent of any child of compulsory school age who is not employed under an age and schooling certificate must send such child to a school or a special education program that conforms to the minimum standards prescribed by the state board of education, for the full time the school or program attended is in session, which shall not be for less than thirty-two weeks per school year. Such attendance must begin within the first week of the school term or program or within one week of the date on which the child begins to reside in the district or within one week after his withdrawal from employment.

For the purpose of operating a school or program on a trimester plan, "full time the school attended is in session," as used in this section means the two trimesters to which the child is assigned by the board of education. For the purpose of operating a school or program on a quarterly plan, "full time the school attended is in session," as used in this section, means the three quarters to which the child is assigned by the board of education. For the purpose of operating a school or program on a pentamester plan, "full time the school is in session," as used in this section, means the four pentamesters to which the child is assigned by the board of education.

Excuses from future attendance at or past absence from school or a special education program may be granted for the causes, by the authorities, and under the following conditions:

(A) The superintendent of schools of the city, exempted village, or county school district in which the child resides may excuse him from attendance for any part of the remainder of the current school year upon satisfactory showing of either of the following facts:

(1) That his bodily or mental condition does not permit his attendance at school or a special education program during such period; this fact is certified in writing by a licensed physician or, in the case of a mental condition, by a licensed physician, a licensed psychologist, licensed school psychologist or a certificated school psychologist; and provision is made for appropriate instruction of the child, in accordance with Chapter 3323. of the Revised Code;

(2) That he is being instructed at home by a person qualified to teach the branches in which instruction is required, and such additional branches, as the advancement and needs of the child may, in the opinion of such superintendent, require. In each such case the issuing superintendent shall file in his office, with a copy of the excuse, papers showing how the inability of the child to attend school or a special education program or the qualifications of the person instructing the child at home were determined. All such excuses shall become void and subject to recall upon the removal of the disability of the child or the cessation of proper home instruction; and thereupon the child or his parents may be proceeded against after due notice whether such excuse be recalled or not.

(B) The state board of education may adopt rules authorizing the superintendent of schools of the district in which the child resides to excuse a child over fourteen years of age from attendance for a future limited period for the purpose of performing necessary work directly and exclusively for his parents or legal guardians.

All excuses provided for in divisions (A) and (B) of this section shall be in writing and shall show the reason for excusing the child. A copy thereof shall be sent to the person in charge of the child.

(C) The board of education of the city, exempted village, or county school district in which a public school is located or the governing authorities of a private or parochial school may in the rules governing the discipline in such schools, prescribe the authority by which and the manner in which any child may be excused for absence from such school for good and sufficient reasons.

The state board of education may by rule prescribe conditions governing the issuance of excuses, which shall be binding upon the authorities empowered to issue them.

APPENDIX N

SECTION 3321.07 O.R.C.

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§ 3321.07 Requirements for child not attending public schools.

If any child attends upon instruction elsewhere than in a public school such instruction shall be in a school which conforms to the minimum standards prescribed by the state board of education. The hours and term of attendance exacted shall be equivalent to the hours and term of attendance required by children in the public schools of the district. This section does not require a child to attend a high school instead of a vocational, commercial, or other special type of school, provided the instruction therein is for a term and for hours equivalent to those of the high

school, and provided his attendance at such school will not interfere with a continuous program of education for the child to the age of sixteen.

APPENDIX O

SECTION 3321.38 O.R.C.

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§ 3321.38 Failure to send child to school.

(A) No parent, guardian, or other person having care of a child of compulsory school age shall violate section 3321.01, 3321.03, 3321.04, 3321.07, 3321.10, 3321.19, 3321.20, or 3331.14 of the Revised Code. The court may require a person convicted of violating this division to give bond in the sum of one hundred dollars with sureties to the approval of the court, conditioned that he will cause the child under his charge to attend upon instruction as provided by law, and remain as a pupil in the school or class during the term prescribed by law.

(B) No parent, guardian, or other person shall fail or refuse to pay a fine and costs for violating division (A) of this section or fail to give bond as provided for in this section.

(C) This section does not relieve from prosecution and conviction any parent, guardian, or other person upon further violation of such sections; nor shall forfeiture of the bond relieve such person from prosecution and conviction upon further violation of such sections.

Section 4109.13 of the Revised Code applies to section 3321.38 of the Revised Code.

*** HISTORY: 137 v H 883. Eff 1-12-79.**

APPENDIX P

SECTION 3321.99 O.R.C.

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§ 3321.99 Penalties.

(A) Whoever violates division (A) of section 3321.38 of the Revised Code shall be fined not less than five nor more than twenty dollars.

(B) Whoever violates division (B) of section 3321.38 of the Revised Code shall be imprisoned not less than ten nor more than thirty days.

APPENDIX Q

TITLE 28, SECTION 1257(3) U.S.C.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX R

1977-78 ST. XAVIER HANDBOOK CONTAINING GROUNDS FOR EXPULSION CONTINUED

Expulsion The following offenses are grounds for expulsion:

1. conduct detrimental to the reputation of the school.
2. conduct detrimental to the health or safety of other students (e.g., bomb threats, false fire alarms, tempering with fire equipment).
3. chronic misconduct by a student who has been previously suspended or placed on probation.
4. twelve demerits in a semester or twenty in a year.
5. a third suspension.
6. dishonesty in any form, especially stealing, even though the article may be of comparatively little value.
7. willfully damaging furniture, equipment, or other school property or the private property of others.
8. immorality in talk or action.
9. possession or distribution of obscene materials.
10. possession or use of alcoholic beverages or drugs on school property or at school-related events.
11. possession or use of fire crackers or other explosives.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1847

MARK W. GERACI, et al.,

Petitioners,

v.

ST. XAVIER HIGH SCHOOL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

---

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

1. Whether, where a petitioner seeks reinstatement to high school, a petition for certiorari is rendered moot by reason of the petitioner's graduation from another high school?

2. Whether the strictures of the due process clause of the fourteenth amendment apply to the disciplinary procedures of a private, parochial high school?

STATEMENT OF THE CASE

On June 2, 1978, the last day of classes for the school year, Mr. James Downie, a teacher at St. Xavier High School, was administering a test to a junior English class, including Petitioner Mark Geraci. Thomas McKenna, a student at another Cincinnati parochial high school, stole into the classroom and struck Mr. Downie in the face with a pie. A struggle ensued between McKenna and Mr. Downie and other teachers. Mr. Downie and another teacher were injured and a glass exit door to the school was shattered in the melee, described by Mark Geraci in the trial court as a "riot."

Upon investigation by the school administrators it was learned that Mark Geraci had solicited his friend McKenna to attack Mr. Downie. Respondent Thomas Meyer, the Assistant Principal for Student Affairs, and the school principal, Respondent Michael Trainor, agreed that Mark Geraci should be contacted and given an opportunity to explain his involvement, if any, and that *if* he admitted to involvement, he would be expelled. Geraci was called at home by Mr. Meyer, who had primary responsibility for disciplinary matters, and asked to come to the school. Geraci had the opportunity to have his mother accompany him but he told her not to do so. Upon being confronted by Mr. Meyer with the accusations against him, Geraci voluntarily admitted his complicity in the planned attack. Faced with this admission, Mr. Meyer expelled him.

Subsequently both Mark Geraci and his father, Petitioner Joseph Geraci, were afforded numerous opportunities to confer privately with St. Xavier's administrators, including the Principal, Mr. Trainor, and the President, Respondent Fr. Paul Borgmann. Joseph Geraci met with Mr. Trainor on Saturday, the day following the attack.

On the next Monday, both Mark Geraci and his father met with Father Borgmann, and on Tuesday Mr. Geraci conferred again with Father Borgmann. In view of the severity of the acts of which Mark Geraci was admittedly a part, the expulsion was upheld.

Contrary to Petitioners' assertions, the evidence at trial clearly established that Mark Geraci did not withdraw from the plot to attack Mr. Downie. During his initial interview with Mr. Meyer, Mark Geraci alleged that he believed that McKenna would not actually perform the attack. Subsequent to the expulsion, however, facts to substantiate the lack of veracity in this contention came to light for the first time.

The original plan was hatched a few weeks before the attack by a group of St. Xavier students, including Mark Geraci. Mark agreed to and did contact his friend McKenna to enlist his aid. By Mark Geraci's own admission at trial the idea then became dormant and "died out." The plan was revived on the evening before the attack during a telephone conversation between Geraci and McKenna (initiated by Geraci) at which time Geraci provided instructions as to the location and time when Mr. Downie could be found and the most effective route of entrance to and escape from the school premises. By agreement, Geraci then telephoned a mutual acquaintance to arrange for him to transport McKenna to St. Xavier the next day. The attack occurred in exactly the manner planned by Geraci (a plan unknown to the other St. Xavier students he claims were involved), except that McKenna was apprehended by school authorities and, upon questioning, implicated Geraci. When questioned by Mr. Meyer and, later that same day, by his parents, Mark Geraci concealed these facts, thereby evidencing the depth of his complicity in the plot.

At trial, Mr. Trainor and Fr. Borgmann described the attack on Mr. Downie which Mark Geraci helped engineer as a most serious breach of discipline and decorum and as a traumatic experience for the teacher and for St. Xavier High School as an educational institution. The school administrators reached the very difficult decision to expel Mark Geraci for participating in this attack while always showing, as found by the Court of Appeals, "a genuine human concern" for Mark and his father.

REASONS FOR DENYING THE WRIT

I. THE PETITION HAS BEEN RENDERED MOOT BY THE GRADUATION OF PETITIONER MARK GERACI FROM ANOTHER PRIVATE, PAROCHIAL HIGH SCHOOL.

Following his expulsion from St. Xavier High School for his admitted complicity in an attack on a teacher, Petitioner Mark Geraci enrolled at another private, parochial high school, Moeller High School, to complete his senior academic year. He has now graduated from this school. Petitioners' Brief p. 22.

Mark Geraci's graduation renders this action to have his expulsion set aside and to be reinstated at St. Xavier moot. *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974). This conclusion is not altered by the fact that petitioners in their brief now raise an asserted prayer for expungement of Mark Geraci's records since this matter was not brought

before the trial court. *Board of School Commissioners of the City of Indianapolis* v. *Jacobs,* 420 U.S. 128 (1975).[1]

Moreover, petitioners have admitted that no real viable controversy remains pending before this Court for decision. Rather, they seek a writ of certiorari as a matter of abstract principle, as admitted in their publicity statements to the press. Appendix A hereto. It is a fundamental judicial principle that such purely academic, abstract questions are to be dismissed as moot. *Hicklin* v. *Coney,* 290 U.S. 169, 173 (1933). See *State ex rel. Devine* v. *Baxter,* 168 Ohio St. 559, 156 N.E.2d 746 (1959). "[T]his Court does not sit to decide arguments after events have put them to rest." *Doremus* v. *Board of Education of the Borough of Hawthorne,* 342 U.S. 429, 433 (1952). The petition for certiorari should be denied because the issue raised is moot and petitioners assert a mere abstract principle.

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[1] *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976) is easily distinguishable and of no aid to Petitioners since it involved a class action which, because the class was certified before the claims of the nominal plaintiffs were mooted, continued to involve a viable controversy. Ohio Revised Code § 2721.09, cited by Petitioners, likewise affords no additional relief since this provision only authorizes an Ohio court to grant incident relief subsequent to that which the party has already pleaded and secured.

II. THE DECISION BELOW IS IN ACCORD WITH THE DECISIONS OF THIS COURT, AND OF LOWER FEDERAL AND STATE COURTS, AS TO THE APPLICATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO PRIVATE, PAROCHIAL SCHOOLS.

The decision that the disciplinary actions of St. Xavier High School, a private, parochial school, are not subject to the due process clause of the fourteenth amendment to the United States Constitution conforms with nearly a century of settled constitutional doctrine.

For nearly one hundred years this Court has affirmed and reaffirmed "the essential dichotomy" set forth in the fourteenth amendment between acts of the state and conduct of private entities. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974); *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948); *Civil Rights Cases*, 109 US 3 (1883). The fourteenth amendment's mandate of due process extends only to the actions of a state, or one acting as the state through the exercise of a traditional and exclusive state prerogative. *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 157 (1978); *Jackson, supra* at 351; *Civil Rights Cases, supra* at 11. Accordingly, this Court and a consistent host of lower federal and state courts have unfailingly refused to subject private, parochial schools to the strictures of this amendment.

Private educational institutions, such as St. Xavier High School, do not act as the state because they engage in a function (education) also performed by the public sector and of interest to the public at large. This principle most

recently was confirmed by this Court in *Jackson, supra* at 354, and at n. 9.[2]

> We do not believe that such a status converts their every action, absent more, into that of the State.[9]

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[9] The argument has been impliedly rejected by this Court on a number of occasions. See, e.g., *Civil Rights Cases*, 109 U.S. 3, 8 (1883). It is difficult to imagine a regulated activity more essential or more "clothed with the public interest" than the maintenance of schools, yet we stated in *Evans* v. *Newton*, 382 U.S. 296, 300 (1966):

> "The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions. While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own parochial educational systems."

This exclusion of private schools and education from the parameters of the public function doctrine is fully consistent with the rationale which underlies the narrow bounds of this doctrine. As articulated by this Court, under the public function, or sovereign function, doctrine,

> State action [is] present in the exercise by a private entity of powers traditionally exclusively reserved to the State.

Jackson, supra at 352. Thus, because a function must be one exclusively performed by the state for it to be a "public function," this Court consistently has declined to extend the public function doctrine to those instances where

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[2] Petitioners concede, as they must, that this Court has never determined that a private, secondary school engages in a public function when it disciplines one of its students so as to raise due process considerations. Petitioners' Brief p. 16.

private entities engage in activities "not traditionally the exclusive prerogative of the State." *Jackson, supra* at 353.[3] As this Court has acknowledged, education has never been the "exclusive prerogative of the State." Private schools and private education have a long and distinguished history in our country existing coextensive with public schools and public education, as equal partners in the rearing of the nation's youths. *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534 (1925).[4] Thus, since education is not an exclusive prerogative of the state, such that its delegation by the state to a private entity would be accompanied by fourteenth amendment considerations, private institutions engaged in educational activities are not state actors for the purposes of the due process clause of the amendment.

Lower federal courts have considered the public function doctrine in the context of the disciplinary procedures of private schools and consistently have held that such are not bound by constitutional restraints imposed on similar public school procedures. In *Greenya* v. *George Washington Univ.,* 512 F.2d 556 (D.C. Cir.), *cert. denied,* 423 U.S. 995 (1975), the Court of Appeals for the District of

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[3] This Court has limited the application of this doctrine to two areas, the conduct of elections, and company towns encompassing all the attributes of a municipality, which "have in common the feature of exclusivity." *Flagg Bros., Inc., supra* at 159.

[4] In considering Petitioners' appeal, the Court of Appeals of the First Appellate District of Ohio correctly acknowledged that private education is not a power traditionally and exclusively reserved to the state and that, therefore, private schools do not necessarily engage in a public function. It observed: "Education is not now and has never been an exclusive function of the state. Privately controlled and administered educational institutions have a long and distinguished history in this country." Opinion of Court of Appeals, pgs. 7a-8a of Petitioners' Brief, Appendix D. (Citations omitted)

Columbia rejected the argument, made at bar by petitioners,[5] that private schools engage in a public function. It reasoned that:

> education, even at the primary or secondary levels, has never been a state monopoly in the United States. As a historical matter, the widescale private developmen of higher education in this country preceded state entry into the field by more than a century. *Powe* v. *Miles,* 407 F.2d 73, 79-80 (2nd Cir. 1968), reaffirmed, *Grafton* v. *Brooklyn Law School,* 478 F.2d 1137 (2nd Cir. 1973).

Id. at 561, n. 10. In accord are *Berrios* v. *Inter American Univ.,* 535 F.2d 1330, 1333 (1st Cir. 1976); *Grafton* v. *Brooklyn Law School,* 478 F.2d 1137, 1140 (2d Cir. 1973); *Powe* v. *Miles,* 407 F.2d 73, 79-80 (2d Cir. 1968); *Lorentzen* v. *Boston College,* 440 F. Supp. 464, 465 (D. Mass. 1977), *affirmed* 577 F.2d 720 (1st Cir. 1978); *Melanson*

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[5] Petitioners' authorities cited at page 7 of their Brief are readily listinguishable. *Slaughter* v. *Brigham Young Univ.,* 514 F.2d 622 (10th Cir.), *cert. denied,* 423 U.S. 898 (1975) deals solely with the issue of a student's rights under an enrollment contract and does not address the public function doctrine and constitutional due process, as Petitioners suggest. The holding in *Buckton* v. *NCAA,* 366 F. Supp. 1152 (D. *Mass.* 1973) was based upon *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968), which has since been overruled by this Court. *Hudgens* v. *NLRB,* 424 U.S. 507 (1976); *Flagg Bros., Inc., supra* at 159. Moreover, Buckton is also suspect on the peculiar facts involved. That is, Boston University asked to be joined in the action since it favored the position of the plaintiff-hockey players. It wanted the plaintiffs to play for the school team and, hence, had no reason to dispute jurisdiction. *Belk* v. *Chancellor of Washington Univ.,* 336 F. Supp. 45 (E.D. Mo. 1970) and *Hammond* v. *University of Tampa,* 344 F. 2d 951 (5th Cir. 1965), did not involve the issue of private school discipline. Nevertheless, the *Belk* court recognized "the principle that the power exercised by a private university in disciplining student members is not 'state action'." 336 F. Supp. at 47. In *Presseisen* v. *Swarthmore,* 71 FRD 34 (E.D. Pa. 1976) the issue was the sufficiency of allegations of state action by a private school. The evidentiary sufficiency of such claims was not before the court.

v. *Rantoul*, 421 F. Supp. 492, 495 (D. R.I. 1976), *affirmed sub nom., Lamb* v. *Rantoul*, 561 F.2d 409 (1st Cir. 1977).

Two further decisions are particularly illustrative. In *Huff* v. *Notre Dame High School of West Haven*, 456 F. Supp. 1145 (D. Conn. 1978), a private, parochial high school student was expelled for disciplinary reasons. He was allowed to confer with school administrators concerning his expulsion, but without the assistance of his parents or counsel. The district court dismissed the student's complaint that he had been denied procedural due process rights under the fourteenth amendment, holding that private, parochial high schools are not engaged in a "public function" because they provide educational services. *Id.* at 1149-50. Similarly, in *Wisch* v. *Sanford School, Inc.*, 420 F. Supp. 1310 (D. Dela. 1976), in which a student was expelled from a private high school for the possession and use of marijuana, the district court held the due process strictures of the fourteenth amendment inapplicable to the disciplinary actions of the private school.

The constitutional doctrine announced by this Court and consistently applied by lower courts prohibits only a state or one acting as the state from depriving another of an interest encompassed within the protection of the fourteenth amendment. Petitioners concede that "St. Xavier High School is not a part of the State of Ohio." Petitioners' Brief p. 12. Moreover, when it disciplined petitioner Mark Geraci for plotting and assisting in the attack on one of its teachers, St. Xavier was not engaging in an exclusive governmental prerogative, such as to be acting as the state. Thus, St. Xavier's action was not subject to the stricture of the fourteenth amendment.

This conclusion is not altered by the fact that St. Xavier, like all private schools, is subject to the state's power to

prescribe minimum educational requirements, nor by the fact that, as found by the trial court, "St. Xavier High School receives only minimal and indirect aid from the State of Ohio." Judgment Entry, Finding Number 1, Page 27a of Petitioners' Brief, Appendix H.

This Court long has recognized the power of the state to prescribe reasonable uniform regulations applicable to all schools without altering or interfering with the separate and distinct nature of private schools. *Pierce, supra* at 534. The mere fact that an activity, such as education, is subject to some state regulation does not convert it into state action. *Jackson, supra* at 350; *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 176-177 (1972).[6]

Lower federal courts consistently have applied this principle and uniformly held that the state's legitimate interest in the regulation of the education of children in all schools, public and private, does not ineluctably convert private schools into an arm of the state. *Grafton, supra; Huff, supra; Wisch, supra; Furumoto* v. *Lyman*, 362 F. Supp. 1267 (N.D. Calif. 1973). Moreover, private schools are not held to be state actors:

1) because of the grant of a tax exemption. *Greenya, supra* at 560 n.4; *Huff, supra* at 1148; *Wisch, supra* at 1314; *Bright* v. *Isenbarger*, 314 F. Supp. 1382, 1396 (N.D. Ind. 1970), *affirmed*, 445 F.2d 412 (7th Cir. 1971);

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[6] Petitioners' reliance on Ohio Revised Code § 3321.04(C) adds nothing to their contentions. Petitioners' Brief p. 16. This statute simply acknowledges a school's "inherent authority to maintain order and to discipline students." *Esteban* v. *Central Mo. State College*, 415 F.2d 1077, 1088 (8th Cir. 1969) (Judge, now Justice, Blackmun). Such recognition of St. Xavier's precedent inherent right to discipline its students does not transmute its acts pursuant to this private right into state action. *Flagg Bros., Inc., supra* at 164-165; *Jackson, supra* at 357.

2) because of the grant of a corporate charter. *Greenya, supra* at 560 n.4; *Powe, supra* at 801; *Furumoto, supra* at 1278; or

3) because of the receipt by some students or their parents of transportation or school book subsidies. *Huff, supra* at 1148[7]; *Wisch, supra* at 1314; *Bright, supra* at 1396; *Grossner* v. *Trustees of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968).

Lacking any constitutional or doctrinal authority for their contention that private entities are bound by the fourteenth amendment, Petitioners would have this Court consign a century of constitutional interpretation and doctrine to the scrapyard of history. On one level, they ask the Court arbitrarily to designate all nonprofit, private entities, such as schools, churches, charities, and nonprofit foundations, as state actors for the mere reason that these private entities are engaged in benevolent charitable activities of concern to the public. Petitioners' Brief pp. 14-15. More incredibly, petitioners, apparently neither content nor comfortable with such a forced construction of what constitutes state action, ask this Court to rewrite the fourteenth amendment by excising the word "State" to make it "enforceable against private citizens, as well as against states." Petitioners' Brief p. 15.

The petitioners' iconoclastic assault on constitutional doctrine cannot prevail. This Court consistently has rejected such overbroad claims of what constitutes a public function as "read[ing] too much into the language of our previous cases." *Flagg Bros., Inc., supra* at 158; *Hudgens* v. *NLRB*, 424 U.S. 507, 519 (1976); *Lloyd* v. *Tanner*,

[7] As the *Huff* court also correctly pointed out, "if all private schools were 'the state', the difficult problem of aid to parochial schools would not exist," citing *Grossner, supra* at 549 n. 19. *Id.* at 1150.

407 U.S. 551, 569 (1972); *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 547 (1972). Nor has this Court ever recognized the argument that the fourteenth amendment is enforceable against private conduct. In *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), cited by petitioners at p. 15 of their brief, this Court held that rights growing out of the thirteenth amendment and other constitutional provisions may be enforced against private parties. However, it did not abandon the essential and basic constitutional dichotomy, subsequently reaffirmed, between state and private action for purposes of the fourteenth amendment. *Jackson, supra.* As recently as this past term, Mr. Justice Stevens, concurring in *Great American Fed. S & L Assn.* v. *Novotny*, 47 USLW 4681 (June 11, 1979) reiterated that *Griffin* instructs that: "The rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment are rights to protection against unequal treatment by the state, not by private parties." *Id.* at 4686.

St. Xavier High School is a private, parochial high school and acted as such when it disciplined Mark Geraci. The court below found no evidence that the State of Ohio was involved in St. Xavier's disciplinary action against Mark Geraci. This disciplinary action did not rise to the level of "state action" and, thus, fourteenth amendment due process considerations are not applicable.[8]

This is not to imply that standards of fairness are not pertinent to this process. Pursuant to the laws of the State

[8] Alternately, even if, hypothetically, St. Xavier did engage in "state action" when it disciplined Mark Geraci, the ultimate inquiry in this case is whether that action constituted a denial of due process. *Flagg Bros., Inc., supra* at 455 n. 4. This Court recently has reiterated that in *public* school disciplinary cases, as controlled by its opinion in *Goss* v. *Lopez*, 419 U.S. 565 (1975):

of Ohio and the contract of enrollment between petitioners and St. Xavier, the school has broad discretion in the exercise of its disciplinary proceedings. *Schoppelrei* v. *Franklin University,* 11 Ohio App. 2d 60, 228 N.E.2d 334 (1967); *Koblitz* v. *Western Reserve University,* 11 Ohio Cir. Dec. 515, 21 Ohio C.C. 144 (1901). After a full hearing with an opportunity to hear the evidence and observe the witnesses the trial court found, without diffculty, that St. Xavier had met that standard in its actions in response to the misconduct of Mark Geraci. After a full review of the entire record the state Court of Appeals concluded that the St. Xavier administrators acted within their discretion, pursuant to fundamentally fair procedures, and, indeed, with "a genuine human concern" for Mark Geraci and his father. Opinion of Court of Appeals, pg. 12a of Petitioners' Brief, Appendix D. It follows, then, that this case involves merely matters of state law and contract, which have been passed upon by those courts, and does not involve a substantial constitutional question.[9]

All that *Goss* required was an "informal give-and-take" between student and the administrative body dismissing him that would, at least, give the student "the opportunity to characterize his conduct and put it in what he deemed the proper context."

Board of Curators of the University of Missouri v. *Horowitz,* 435 U.S. 78, 85-86 (1978). At bar, Mark Geraci and his father were each provided three opportunities to present their case to St. Xavier officials before the expulsion was finally affirmed. This process would have been constitutionally sufficient under *Goss* and *Horowitz* even if St. Xavier were a public high school, which it is not. *Whiteside* v. *Kay,* 446 F. Supp. 716 (W.D. La. 1978).

[9] Petitioners as much as admit that their action does not involve a constitutional question when, finally, they confirm on page 24 of their Brief that "This case would not have arisen if any of the lesser penalties [than Mark Geraci's expulsion] had been chosen." Despite their protestations that they were denied constitutionally required process during the disciplinary proceedings, in fact their grievance is not with this process, which was found upon review by three courts to have been fundamentally fair, but with the degree of the penalty imposed for Mark Geraci's misconduct. This penalty was imposed within the school's sound discretion, to maintain discipline and decorum, as permitted by law and approved by the courts. Its degree does not raise a substantial constitutional question, nor do the Petitioners assert that it does.

CONCLUSION

Petitioners' Petition for Writ of Certiorari should be denied for the reasons set forth above.

Respectfully submitted,

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APPENDIX A

AREA NEWS

Pie-Throwing Expulsion Case Goes To High Court

Mark W. Geraci, a top student expelled from St. Xavier High School following a pie-throwing incident last year, has appealed to the U.S. Supreme Court a state court ruling upholding his expulsion.

Geraci's attorney, Hyman B. Rosen, has mailed to the high court a petition for a writ of certiorari. It probably will be at least seven months before the court decides whether to issue the writ and hear the appeal.

Rosen maintains St. Xavier denied Geraci due process of law by expelling him without a hearing.

In June, 1978, on the last day of school in Geraci's junior year at St. Xavier, he was accused of participating in an incident in which a lemon meringue pie was thrown at a teacher. Geraci was expelled summarily by a school administrator later the same day.

GERACI AND his father filed suit last August against St. Xavier and its administrators in an attempt to win Mark's reinstatement.

A Hamilton County Common Pleas judge upheld Mark's expulsion. The Ohio First District Court of Appeals and Supreme Court of Ohio upheld the trial court's ruling.

Geraci, 18, of 3510 E. Galbraith Rd., Amberley Village, was the number one student in his class at St. Xavier. As a senior at Moeller High School this year, he was top student in four of his six classes, and ranked second in the other two classes.

Geraci graduated from Moeller and will attend the University of Colorado in the fall. He was not accepted at Stanford University, his first choice, and he said interviewers at Stanford asked him about the pie-throwing incident.

"I don't know if it (rejection at Stanford) was because of what happened at St. X or not," Geraci said. "I guess I will always wonder."

HE PLANS to major in psychology as a pre-med student and wants to be a psychiatrist.

The question of Geraci's reinstatement at St. Xavier is moot. The appeal to the U.S. Supreme Court is being pursued on principle, Geraci said. He agrues that a previous Supreme Court ruling according due process rights to public school students should apply to private school students because private schools receive some government aid.

Rosen's appellate brief says the Geraci case is the first involving the denial of due process rights to parochial school students.

"I'm real optimistic that the Supreme Court will hear the case," Geraci said. "I think it's an issue they will want to hear, but I have no idea what they might decide."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1847

MARK W. GERACI

and

JOSEPH A. GERACI,

Petitioners,

vs.

ST. XAVIER HIGH SCHOOL,
REV. PAUL BORGMANN,
MICHAEL D. TRAINOR,
THOMAS A. MEYER,
REV. ROBERT O'CONNER,
RICHARD B. BERNING,
RICHARD J. PIENING,
JAMES F. CAHILL,
REV. DANIEL L. FLAHERTY,

and

SOCIETY OF JESUS,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Ohio

PETITIONERS' REPLY BRIEF

(Counsel on inside cover)

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PETITIONERS' REPLY BRIEF

STATEMENT OF THE CASE

The Respondents have referred in their Brief to the pie-throwing incident as a "most serious breach of discipline and a traumatic experience for the teacher and for St. Xavier High School" as justification for the severe and unjust action which it took against Mark Geraci.

The fact that Mark's expulsion has so little support in the St. Xavier community is evidenced by the fact that not a single teacher, student, or parent, except Mr. Downie

testified for St. Xavier High School. As a matter of fact, Mr. Downie testified that he accepted Mark's apology, liked Mark, had no animosity towards him, was never consulted about the penalty, and had naught to do with Mark's expulsion. Mark, in turn, thought very highly of Mr. Downie, gave him as his first reference for college, and evaluated him as good or excellent in various categories as a teacher and as a person in the official evaluation which students make of their teachers. It was admitted by all that there was no malice involved in the throwing of the pie.

Also, the summary expulsion of Mark from St. Xavier High School by Mr. Meyer and its confirmation by Mr. Trainor, the Principal and Father Borgmann, the President, did not meet "fundamentally fair procedure" or show "a genuine human concern for Mark and his father", as stated by the Respondents. The expulsion did not follow the submission of the case to the Disciplinary Board, there were no procedures set up for a hearing before Mr. Meyer, nor for an appeal to Mr. Trainor and Father Borgmann. Every fundamental right of Mark's was violated. He was summoned to a meeting by Mr. Meyer, the Assistant Principal in the evening after school hours, without being told that he was charged with an offense, was never told that he was subject to expulsion, was never advised as to what specific disciplinary rule he had violated, that he could refuse to answer questions, was entitled to confer with counsel, or even with his parents. He was denied the basic rights to which even the worst criminal is entitled under law. Instead, a seventeen year old boy was confronted alone by an admittedly agitated school administrator who had been ordered by his superior to punish him with the most severe penalty he could inflict. In so doing, he proceeded without contacting

Mark's parents, whose presence he testified was advisable because he "would like to hear from them too as to what they think about it", and "because they are more mature people than the son".

Father Borgmann also testified:

> "I like to have parents present when a young man is expelled."

Moreover, Mr. Meyer was hasty and he did not wait until the excitement had died down, and calmness and reason prevailed. His lack of appreciation for the terrible harm and injury he had done Mark and of the severity of the penalty is evident from his testimony:

> "Q. But you knew that expulsion would cause an awful lot of injury to Mark Geraci, didn't you know that sir?
>
> A. I didn't necessarily know that."

The contacts between the Geracis and Mr. Trainor and Father Borgmann were on an informal basis and had no official sanction in the Handbook, or the Rules and Regulations of St. Xavier High School. They resulted because the Geracis insisted on seeing them. No witnesses were presented and the meetings were in the nature of conversations between the parties. The Geracis were told that the administrators were not interested in hearing from the six other boys involved in the conspiracy, their minds had been made up and they were not going to change them.

ARGUMENT

I. THE PETITION HAS NOT BEEN RENDERED MOOT BY THE GRADUATION OF MARK GERACI FROM ANOTHER PRIVATE, PAROCHIAL HIGH SCHOOL.

Petitioners Seek Post-Graduation Relief.

This case is not moot. The news story from the Cincinnati Enquirer of June 12, 1979 attached to Respondents' Brief as Appendix A adds nothing to this case. Admittedly, Geraci's reinstatement to St. Xavier High School is moot. He has graduated from another high school, and further attendance at St. Xavier High School is out of the question.

However, if Mark was unlawfully expelled, there is no doubt that the Petitioners have pending causes of action against the Respondents which they asserted in their Complaint which are viable and not moot.

In addition to expungement of the student's record of an invalid expulsion imposed without a due process hearing, the student is also entitled to monetary damages for injuries sustained even when there is no pecuniary loss, *Piphus* v. *People United to Save Humanity,* 545 F. (2d) 30. Likewise, his father has a similar cause of action, both of which survive even after Mark's graduation.

Unlike the factual situation in *Board of School Commissioners of the City of Indianapolis* v. *Jacobs,* 420 U.S. 128, the Petitioners presented substantial proof of personal injuries sustained as a result of Mark's expulsion. Mark testified that he sustained emotional injury which "damaged me as far as my ideas of justice and what it was all about. I didn't think I was treated fairly . . . A

lot of times I couldn't sleep after I found out. I had a lot of sleepless nights, and since then developed stomach problems that I had to go to the doctor for pills . . ."

Joseph A. Geraci, the father, testified that he suffered mental anguish, lost twelve pounds, and aggravation of a previous back condition, nerves and that "I am still most upset and was physically and mentally whipped with the situation".

In addition, the Petitioners pointed out to the Supreme Court of Ohio in their brief:

> ". . . even if he graduates from another school this case would not be moot since a real viable controversy would still be pending before the Courts."

The devastating and damaging effect of an improper or arbitrary suspension or expulsion of a student from school is well documented by this Court in *Goss* v. *Lopez,* 419 U.S. 565, 574.

II. THE CONSTITUTIONAL RIGHT OF DUE PROCESS SET FORTH IN THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION APPLIES TO AND IS CONTROLLING IN DISCIPLINARY PROCEEDINGS BY A PRIVATE SCHOOL AGAINST A STUDENT.

Private Education Performs A "Public Function" And Involves The State.

The denial of the doctrine of "public or governmental function" invoking the Fourteenth Amendment asserted by the Petitioners has been limited largely to cases involving activities of a business nature carried on for profit. The operation of a public utility or a club where liquor is dispensed under a state license can hardly be equated with educational activities declared mandatory by the state. The differences between such cases, the regulation of parochial schools by the state, and the importance of such regulation for the advancement of good citizenship was pointed out by this Court in *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534, wherein the Court stated:

> "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and *patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.*" (Emphasis Ours)

The language in *Evans* v. *Newton,* 382 U.S. 296, and *Jackson* v. *Metropolitan Edison Company,* 419 U.S. 345,

is obiter dictum, and as previously pointed out, not binding or determinative of the issues in this case.

Jackson deals with an entirely different situation, namely whether a private utility organized for profit is engaged in "state action" so that a customer whose service was discontinued for non-payment is entitled to notice and other "due process". This Court held that such activity of the utility is private and not governmental, and we heartily agree.

This Court has never decided the issue before it as to whether private or parochial schools carrying on educational activities sanctioned by the State in the mandatory education of primary and secondary school children are governed by the due process provision of the Fourteenth Amendment.

This was recently recognized by this Court in *Flagg Bros., Inc.* v. *Brooks,* 436 U.S. 149, cited by the Respondents. While denying that a warehouseman selling property stored by it in accordance with the New York Statutes in order to perfect its lien for non-payment of storage fees was engaged in "state action" within the Fourteenth Amendment, it made it very clear that this decision had very limited application. This Court stated:

> "And we would be remiss if we did not note that there are a number of state and municipal functions not covered by our election cases or governed by the reasoning of *Marsh* which have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called 'dispute resolution'. *Among these are such functions as education, fire and police protection, and tax collection. We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment.* The mere

recitation of these possible permutations and combinations of factual situations suffices to caution us that their resolution should abide the necessity of deciding them." (Emphasis Ours)

In this regard, Ohio has recognized the public nature of the performance of the duties of a private policeman commissioned by public authority, holding the private employer who paid such policeman not liable for the acts of such private policeman because he is presumed to be acting in his official capacity as a policeman, *New York, Chicago and St. Louis Railroad Co.* v. *Fieback,* 87 Oh. St. 254, 100 N.E. 889; *Erie Railroad Co.* v. *Johnson,* 106 F. (2d) 550 (C.C.A. 6).

Due Process Is Required In Determination Of The Penalty.

Moreover, while at all times Mark Geraci denied his guilt, he nevertheless was entitled to a due process hearing. Due process to which a person is entitled is as applicable to the proceedings for the imposition of the penalty as it is to the proceedings for the determination of guilt. The Respondents are therefore in error in their claim that since Mark Geraci was guilty of the offense he was not entitled to a due process hearing on the matter of the penalty.

Lockett v. *State of Ohio,* 98 Sup. Ct. Rep. 2984, is ample authority that the Constitution requires due process and fairness in the consideration of the penalty after a person has been found guilty.

In addition, the imposition of a penalty not based on standards, but strictly based on whim or caprice is unconstitutional, *Furman* v. *Georgia,* 408 U.S. 238.

Mandatory penalties are likewise unconstitutional in capital cases, *Woodson* v. *North Carolina,* 428 U.S. 280.

Similarly, a student who unequivocably admits his guilt and who faces expulsion is entitled to a due process hearing. *Keller* v. *Fochs,* 385 F. Supp. 262 (E.D. Wisc.)

More Formality In Proceedings Is Required In Expulsion Cases.

Also, in *Vought* v. *VanBuren,* 306 F. Supp. 1138 (E.D. Mich.), the fact that a public school student and his parents were advised by the principal that he was expelled from school and later given the opportunity to contest the expulsion before the Board of Education did not constitute due process and such action violated his constitutional rights. Similarly to this case, the Court found the student was entitled to a substantial hearing before the expulsion as pointed out in *Vought* on P. 1363:

> "It goes without saying, and needs no elaboration, that a record of expulsion from high school constitutes a lifetime stigma. It would seem that in taking an action of such drastic nature the Board of Education would have been interested in providing plaintiff with the opportunity to offer his explantion of the circumstances prior to the actual expulsion action by the Board. The position defendants seemed to take was an adamant one – plaintiff was guilty of violating the school policy as contained in the memorandum which had been read to him and he knew expulsion could result. Therefore, say defendants, nothing more was owed Plaintiff by defendants. Plaintiff claims he was entitled to a hearing. Defendants say he got one. Defendants refer to the Board meeting when Plaintiff appeared with his parents and his attorney. This was subsequent to the expulsion. Plaintiff has been presented with a fait accompli at this point."

There can be no minimizing the gravity and the tremendous harm which results from expulsion. In this regard, *Sullivan* v. *Houston Independent School District,* 333 F. Supp. 1149, 1172 (S.D. Tex.), pungently observed:

> " . . . suspension is a particularly humiliating punishment evoking images of the public penitent of medieval Christendom and colonial Massachusetts, the outlaw of the American West, and the ostracized citizen of Classical Athens. Suspension is an officially-sanctioned judgment that a student be for some period removed beyond the pale."

Judge James Doyle in *Soglin* v. *Kauffman,* 295 F. Supp. 978, 988, (W.D. Wis.) recognized the severe punitive effect of a school expulsion in the following language:

> "I take notice that in the present day, expulsion from an institution of higher learning, or suspension for a period of time substantial enough to prevent one from obtaining academic credit for a particular term, may well be, and often is in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding."

Goss v. *Lopez,* 419 U.S. 565 is authority for:

(1) Notice and a hearing are required in public school disciplinary proceedings.

(2) Longer suspensions require more formal procedure.

This is evident from P. 581 of the Opinion:

> "We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency."

Also, on P. 584 of *Goss* the following appears:

> "Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."

Board of Curators of the University of Missouri v. *Horwitz,* 435 U.S. 78, cited by the Respondents on P. 14 of their Brief is not in point except that this Court has very emphatically drawn the distinction that due process must be granted in disciplinary proceedings, and not in cases of dismissal for academic reasons. Further, the medical student dismissed for academic reasons had had several warnings, had been placed on probation, was aware that her work was being closely monitored, and was allowed an adequate appeal to the Provost of the University. The proceedings were not summary as in this case.

Power Of Expulsion By Private Schools Is Sanctioned By Ohio Statute.

Moose Lodge No. 107 v. *Irvis,* 407 U.S. 163, cited by the Respondents on P. 11 of their brief is not authority for the Respondents' position, but to the contrary supports Petitioners' claim. In *Moose Lodge,* a liquor license to a private club issued by the State of Pennsylvania made the actions of the Lodge in discriminating against blacks in membership as required by its Constitution and By-Laws unconstitutional under the Fourteenth Amendment. The regulation of the Pennsylvania Liquor Control Board which required "every club licensee to adhere to all of the provisions of its Constitution and By-Laws" placed the force and weight of the State of Pennsylvania behind the discriminatory policy of the private club and constituted state action.

Similarly, *3321.04(C) O.R.C.* (Page 32 (a) Petitioners' Original Brief) authorizing Mark's expulsion, to use the language found on P. 178 of *Moose Lodge* "would be to place state sanctions" behind Mark's expulsion.

Grounds Of Expulsion Are Unconstitutional Because Of Vagueness And Generality.

It should also be pointed out that the Respondents have not answered in their Brief the argument of the Petitioners that they were denied due process because the expulsion of Mark Geraci was based on Grounds 2 and 8 of the St. Xavier Handbook, which has been appended to the Petitioner's Petition as Appendix R, which were vague and not specific. There was no valid charge ever asserted against Mark, and all proceedings must be deemed void.

Justice Thomas Clark is in accord in *Nitzburg* v. *Parks*, 525 F. (2d) 378 (C.C.A. 4) wherein he found a regulation of the Board of Education permitting the distribution of literature by students on school property "as long as the distribution of said literature does not reasonably lead the principal to forecast substantial disruption or material interference with school activities" to be unconstitutional. Justice Clark stated on P. 383 that this regulation, which carried with it the penalty of suspension, did not detail criteria or set forth standards, and thus:

> "On its face, therefore, the Board's regulations are void for vagueness and overbreadth."

Also overlooked in Respondents' Brief is the fact that Judge Bettman of the Ohio Court of Appeals in his Opinion intimated that *R.C. 3321.04(C)* did sanction St. Xavier High School's decision to expel Mark Geraci, but disagreed with Petitioners that this made Mark's expulsion "state action." Judge Bettman's language is as follows:

> "To the extent that appellant may be correct in asserting that a private school's decision to suspend or expel a student is sanctioned by *R.C. 3321.04(C)*,

> this still does not involve the state in the decision-making process."

Petitioners disagree and contend that if the power to expel a student in a private or parochial school is sanctioned by the state, the state does become involved in the decision-making process to the extent that such power under Ohio law must be used reasonably and not abused by a private school, *Schoppelrei* v. *Franklin University*, 11 Oh. App. (2d) 62.

Also, it should be borne in mind that *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534, does not authorize completely independent private or parochial schools, but mandates that such schools are subject to reasonable regulation and must carry out the purpose of the state and not be "inimical to the public welfare." Such "public welfare" requires that the interests of the State not be defeated by injury to a student which causes him to question the values of a democratic society. This was pointed out in *58 Marquette Law Review, 705, 739*:

> "The recent court intervention into school discipline should not be seen by school administration as a direct attack on their authority to manage and control the educational process. It instead should serve as the impetus for schools to transform the traditional concepts of due process into a classroom demonstration of how a democratic society functions.
>
> Students have a peculiar need for receiving fair treatment. In a time when the 'system' is being challenged on all fronts, students are looking for evidence that they live in a fair society in which rules, not the arbitrary action of men, governs. If their first contact with the 'system' results in feelings of unfairness and bitterness the damage done may be irreparable."

Respondents incorrectly have drawn the conclusion on P. 14 of their Brief that Petitioners have admitted that Respondents' action does not involve a constitutional question because of the reference to P. 24 of Petitioners' Brief. If anything less than expulsion had been chosen, because of the extreme expense involved in this litigation, it is likely that for practical reasons this case would not have been brought. Thus, it is not only the procedural defect, but the severity of the punishment which is under attack. Even the Trial Court on P. 9 of its Opinion characterized the expulsion as "drastic punishment."

CONCLUSION

It should be evident that Mark and his father have been greatly injured by Mark's expulsion. It also should be evident that the school administrators had acted in a manner which was unreasonable, punitive, and while they were agitated. It is also clear that they had not considered Mark's unblemished record in the matter of discipline, as well as the fact that he was the outstanding student of his class, because they had concluded that nothing he could say or do would mitigate the penalty of expulsion. They failed to notify his parents, even though they admitted that their presence was advisable and the usual procedure. The grounds for Mark's expulsion were vague and did not meet constitutional standards.

Also, the Administrators admittedly pre-judged the case which renders all proceedings void, *Tumey* v. *Ohio,* 273 U.S. 510.

The public function of education was eloquently stated in *Brown* v. *Board of Education,* 347 U.S. 483:

> "Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . "

In every respect Mark was denied rights. Moreover, due process requires "fundamentally fair procedures" as pointed out by this Court in *Goss* v. *Lopez,* 419 U.S. 565, 574. This Court has recognized the rights of juveniles in criminal cases, *In Re Gault,* 387 U.S. 1. Civil law generally gives a minor more, and not less, protection than it accords an adult, which was entirely lacking in this case.

Education at the primary and secondary levels in private or parochial schools in a state which makes education to the age of eighteen mandatory is a public function, and such private or parochial schools are engaged in activities which are subject to the Constitution of the United States.

There is no First Amendment issue involved in this case. The Respondents have never raised it, perhaps because the philosophy on "due process" applicable in matters relating to the Catholic religion in the Cincinnati Archdiocese has found expression in the distribution by it of literature which states.

> "The protection of human rights and freedoms has become a matter of concern to all members of the Church. The dignity of the human person, the principles of fundamental fairness and the universally applicable presumption of freedom require that no member of the Church arbitrarily be deprived of the exercise of any right or office. Rights without legal safeguards both preventive and by way of effective recourse, are often meaningless. Procedural protections are known as "due process" whereby the rights of all persons in the Church may be adequately safeguarded. It is the

> noblest service of the Church to afford effective safeguards for the protection of rights, and, where rights have been violated, to afford effective means for their prompt restoration. . . "

Consequently, Mark and his father had a right to assume that in its disciplinary proceedings St. Xavier High School would act in accordance with the basic Catholic concepts of due process and the spirit of forgiveness. They certainly define the relationship between the parties and constitute a part of the contract for Mark's enrollment and continued education which the respondents have denied him.

Petitioners do not seek to "have this Court consign a century of Constitutional interpretation and doctrine to the scrapyard of history". The issue presented to this Court has never been decided by it. Petitioners seek only to apply the reasoning and analogy of *Marsh* v. *Alabama,* 326 U.S. 501, which this Court has consistently cited with approval in subsequent cases as authority that private activity which performs a public and governmental function represents "state action." They particularly refer to the almost identical public nature of the functions performed by private education and a company-owned town, and the applicable reasoning of Justice Frankfurter on P. 510 of his concurring Opinion in *Marsh*:

> "But a company-owned town is still a town in its community aspects. It does not differ from other towns."

This Court has reserved the determination of the issue raised in this case as to whether private or parochial schools are subject to the Fourteenth Amendment of the United States Constitution. This issue has wide interest and applicability.

Petitioners submit that their Petition should be granted.

Respectfully submitted,

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